No. 16282

United States

Court of Appeals

for the Ninth Circuit

REXALL DRUG COMPANY, a Corporation, and ARNOLD L. LEWIS, Doing Business as Studio Cosmetics Company, Appellants,

vs.

SANDRA MAE NIHILL, a Minor, by Her Father and Guardian John Nihill, Appellee.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 409 to 812, inclusive)

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—4-2-59

See also Vol. 3165

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(Testimony of Mrs. John W. Nihill.)

Q. Of what?

A. Of the pin curl solution.

Q. The second ten minutes? A. Yes.

Q. All right? What happened?

A. She started to make the test curl and she lacked two minutes of being ten minutes and when I came back and saw her, she left it up until the ten minutes were up, and then she rinsed it.

Q. And that was a two-minute difference?

A. Yes, sir.

Q. So you had her put it back for the other two minutes? [90] A. Yes, sir.

Q. All right. Do you, of your own knowledge, Mrs. Nihill, know how often before Sandra had had a home permanent wave?

A. You mean before this last one?

Q. Before the Cara Nome?

A. It must have been about a year and a half.

Q. And what was used at that time?

A. A Toni.

Q. Is that the only one, or not, that she ever had?

A. Yes. Before that she wore long braids.

Q. What was the result of the Toni wave?

A. It was beautiful.

Q. Now, Mrs. Nihill, when did you first notice any change in Sandra's hair after the permanent?

A. It was about a week afterwards.

Q. And what did you notice?

A. Well her hair was starting to come out.

(Testimony of Mrs. John W. Nihill.)

Q. How long did that continue before you became alarmed?

A. Well within about ten days after that, I was still kind of wondering what was causing it and about that time my brother-in-law died in Seattle and I had to go there, but before I left I told them to be sure to take Sandra to the doctor and see what was causing her hair to fall out. [91]

Q. She actually went to the doctor the first time while you were in Seattle? A. Yes, sir.

Q. All during this time and up to the time that you left for Seattle, will you tell the jury whether or not there was any eyebrow loss?

A. No there was not.

Q. Had there been any eye lash loss?

A. No.

Q. Now when you got back Sandra had already been to see Dr. Martin? A. Yes.

Q. Now, will you tell the jury, between there and commencement time, what the general condition of Sandra's hair was, which would be the end of May?

A. Well, it just gradually fell out; it was coming out so that on the 26th of May she had very little hair, but there was just enough so we could kind of comb it, so she would have a light covering on her *hair.*

Q. For the purpose of commencement?

A. Yes.

Q. Now, will you tell the jury what the condition

(Testimony of Mrs. John W. Nihill.)

of her hair was by the time of Confirmation, the middle of June?

A. She was practically bald. [92]

Q. When did you first notice Sandra's eyebrows beginning to disappear?

A. That was about the time I noticed that her eyebrows were beginning to go.

Q. About that time? A. Yes.

Q. Had you noticed any change in her eyebrows at all up to Commencement time, May 26th?

A. No.

Q. That wasn't until about the middle of June then? A. Yes.

Q. Did that or not alarm you?

A. Yes it did.

Q. Did you send her back to Dr. Martin again?

A. Yes.

Q. And that was on July 6th? A. Yes.

Q. And that's the time that he referred her to Dr. Melton? A. Yes.

Q. You were not there originally at the time that the use of selsum was prescribed?

A. No, I wasn't.

Q. Did you ever apply it for her?

A. Do what?

Q. Did you ever apply the selsum for her? For Sandra? Did you ever put it on her head? [93]

A. No. My older daughter did.

Q. Now, Mrs. Nihill, will you tell me, when Sandra's hair started falling out and started really

(Testimony of Mrs. John W. Nihill.)
getting to be very thin, will you tell me and the jury the effect that it had on Sandra?

Mr. Packard: This calls for a conclusion, your Honor.

The Court: Well, she may answer the question if she will confine her answer to the descriptive terms, not to some conclusions that she may arrive at.

Mr. Lanier: You may answer now.

A. Well, she began to—she was hurt you could see that. Many times I found her crying and I would ask her what was wrong. She wouldn't tell and I'd ask her if she was sick she wouldn't tell. She began to get embarrassed. She didn't want to go out with us.

Q. Did you have difficulty getting her to go out places with the other children?

A. Yes, sir. She didn't even want to wear her dresses, and if I wanted to buy her a new dress she would say "Oh, I can't wear that, I can't look dressed up." (The witness is crying.)

Q. Now you just take your time, Mrs. Nihill. [94] Toward the end of that year, that first year, which would be in the early part of May, I believe that there was a Junior Prom, was there not?

A. Yes, there was.

Q. Did she go to it?

A. She refused to go to it. That night she took her horse and she went for a ride and when she came back I could see she had been crying. I didn't

(Testimony of Mrs. John W. Nihill.)

have to ask her why. (Witness is crying.) I knew the answer.

Q. Mrs. Nihill, as a matter of fact, when you would find Sandra crying, would she admit the reason why? A. No, she would not.

Q. Has she ever admitted to you, and does she admit, that she has herself been injured?

A. No, she didn't then and she won't now. It just seems like she just wants to shrug it off.

Q. And the other things you feel affect her are what you actually observed?

A. Well her marks in school have gone down, she doesn't seem to want to put on a pretty dress for fear that she might have one that will be prettier than some other girl's. I don't know, it just affected her whole personality.

Q. Have you noticed a change in her personality since this has happened? [95]

A. Oh, yes, she has no self-confidence anymore. She's afraid.

Q. Did you go into Fargo with her on August 9th to see Dr. Melton? A. I did.

Q. Does she have any boy friends?

A. No, she has not.

Q. Did she use to have?

A. She use to have admirers.

Q. Prior to this accident, did she mix and associate, generally speaking, as the others, with her classmates? A. Yes, she did.

Q. Does she do it now?

A. No, not so well.

(Testimony of Mrs. John W. Nihill.)

Q. After noticing the hair effect, Mrs. Nihill, did you ever go back in and notify your druggist of the effect?

A. I did. In fact I bought—the same prescription that Dr. Martin gave to me for Sandra's hair was bought at the Rexall Drug Store at Kinsal.

Q. That was the hair prescription given by Dr. Martin? A. Yes.

Mr. Lanier: Your witness. [96]

Cross Examination

Q. (By Mr. Packard): Now, Mrs. Nihill, isn't it a fact that the testimony you just gave us relative to the manner in which this cold wave was given was based upon the reading of the instructions and directions solely?

A. Yes, we read and followed the directions right to a "T."

Q. Isn't it a fact you read the instructions last night?

A. Maybe I did to refresh my mind a little.

Q. Well you say "maybe," you did, didn't you?

A. Yes I did.

Q. And, isn't it a fact your testimony here today is based upon what you read last night in the instructions, not what you recall back on February 5, 1955? A. No, it is not.

Q. And your testimony that you are giving is based solely upon your recollection, which has been refreshed by the reading of the instructions. Is that your testimony? A. Yes.

(Testimony of Mrs. John W. Nihill.)

Q. And you recall this morning, at quarter to ten you walked into the courtroom, and I happened to be seated right here, and your attorney Mr. Lanier said to you "Did you read the instructions——

Mr. Lanier: One moment if the Court please. One moment. [97]

Mr Packard: This is proper cross examination.

Mr. Lanier: Counsel is going entirely—I don't know even what he is going to bring out, and don't much care, it's just that it's not proper and regular.

Mr. Packard: All right.

Mr. Lanier: He is going beyond the scope of the examination; he is going beyond anything in the testimony and it's improper examination——

Mr. Packard: All right. I don't think it is improper.

Mr. Lanier: (Continuing) ——unless he was using it for impeachment purposes, your Honor, and the witness has testified that of course she refreshed her memory last night by going over the directions.

Mr. Packard: This is proper.

The Court: That's perfectly proper to cross examine her about that. It is always done. I don't know what you are referring to here. In fact I didn't follow the question. [98] I was trying to read the instructions. That's the first time I've seen them.

Mr. Packard: I'll reframe the question.

Q. (Mr. Packard, resuming): Mrs. Nihill, isn't it a fact that this morning at quarter to ten you walked in this courtroom, and you were standing

(Testimony of Mrs. John W. Nihill.)

right over here and I was seated over at the counsel table and your attorney Mr. Lanier came up to you and said "Did you read the instructions?" Now, isn't it a fact he asked you that question?

A. Yes, he did.

Q. And is it not a fact, at that time, that you told your attorney that you are supposed to put the neutralizer on after the solution? Isn't that a fact? A. Yes, sir.

Q. Yes. That is because you recall the testimony in Court here where the solution was poured over the head and you read the instructions and you found out last night that the neutralizer should have been put on afterwards?

A. No, sir; I knew that when I was sitting back there listening to you, and you were mixing everybody up by calling this a solution and this a solution. [99]

Q. I don't want to confuse anyone. I wasn't mixing anyone up. That testimony came from the reading of the depositions and I was not present then and that's where you gather that there was confusion as to which was put on first and last, isn't that correct?

A. No, sir. When you were cross examining Sandra yesterday you were asking if this solution was put on and this solution. I don't know how many of these men are acquainted with this home permanent, but if you call both a solution—as soon as you put neutralizer with the water, doesn't it become a solution?

(Testimony of Mrs. John W. Nihill.)

Q. All right. Let me ask you this——

A. How are you going to tell which one of the solutions are you going to have? They are both a solution. There's a pin curl lotion and also the neutralizer.

Q. I want to apologize and I don't want to upset you, but you are at a little disadvantage because I'm the only one that will be asking questions. I'm sorry I can't answer your question, but you just answer my questions. Now, let me ask you one further question. You recall the testimony about the fact that Sandra was taken to the wash basin over the sink. Is that correct? A. Yes, sir.

Q. And what was put on her head there at the sink? [100]

A. That was the neutralizer.

Q. All right. Calling your attention to your deposition.

Have you got the deposition file of Mrs. Nihill?

(The Clerk furnished counsel with the deposition of Mrs. Nihill.)

Mr. Packard: Counsel, will you stipulate that the proper foundation has been laid, the deposition has been taken and there's been no corrections in the deposition?

Mr. Lanier: So stipulated.

Q. (By Mr. Packard, resuming): Now I believe you have already testified that the solution—there's a solution in the bottle, isn't that correct? A certain solution comes in the bottle?

(Testimony of Mrs. John W. Nihill.)

A. Yes, at the time—yes.

Q. There's a certain solution——

A. The pin curl lotion is a solution.

Q. That's a curl lotion in the bottle—right?

A. Yes.

Q. And there is a neutralizer which you mix by taking a little powder that comes in a little package and you mix that with water, you testified to the court, and so fourth. Is that correct?

A. Yes, and it becomes a solution. [101]

Q. All right. Now, calling your attention to your deposition which was taken on August 1, 1957, in Jamestown, North Dakota, and calling your attention to page 5, line 10, the following questions and answers were propounded to you by Mr. Lanier:

"Question—And where was this solution at the time?

Answer—Well, it was in the bottle. I guess that's where it was. Then she poured it into the dish, or half of it rather. That is the way it is supposed to be.

Question—And then after that what was done next?

Answer—Well, then it was allowed to stand so long, and she went out to the sink and the rest of it was poured on over her head."

Now, do you recall you were asked those questions and you gave those answers on August 1, 1957?

Mr. Lanier: Now, may it please the Court, I

(Testimony of Mrs. John W. Nihill.)
have no objection whatever to the offer nor the answers, but I want the entire context, not part of it. I request that counsel read the answer also starting at line 2 immediately preceding that question and answer.

Mr. Packard: Well, counsel, you can follow your own procedure. You can bring out any portion of the deposition you want. This is my cross-examination and I'll read [102] whatever portion I desire.

Mr. Lanier: I think we'll leave that to the Court, counsel; but, your Honor, there is no point in ever confusing a witness and taking a sentence out of context. The entire question and answer series should be asked.

Mr. Packard: Just a moment here, your Honor. I am following my proper right to cross-examination. If counsel has any objections to make I think he should state them on legal grounds.

Mr. Lanier: I just made it, counsel.

The Court: Overruled. You may answer the question. Did you get the questions and answers he asked you about?

The Witness: I'm afraid I forgot it.

Mr. Packard: My question is, Mrs. Nihill, do you recall being asked those questions and giving those answers at the time your deposition was taken on August 1, 1957, in Jamestown, North Dakota?

A. I suppose if you have it down it must be right. I don't recall. [103]

(Testimony of Mrs. John W. Nihill.)

Q. And you did then read the instructions last night? A. Yes, I did.

Q. And when was the last time you read them before last night?

A. The time we gave the permanent.

Q. Now you stated that after this permanent had been given to your daughter, you had an unfortunate death in the family and you went to Seattle? A. Yes, I did.

Q. And for what period of time were you in Seattle?

A. Well I was home—I wasn't there very long, because I was home about the first of March—no, I was home about the—I was home by the 16th—I was home before the 16th, but I can't just remember what day I did come home, but it was before the 16th of March.

Q. All right. About the middle of March. Is that correct?

A. Well I can say it was before the 16th because——

Q. Do you recall filing your income tax? (Laughter.)

A. I had a grandson born that night.

Q. Now, before you—I'm not sure I recall, did you say you left about one week or ten days after this cold wave was given?

A. Well, let's see, it might have been about the 20th or 21st, somewhere along in there.

Q. It was before Sandra had gone to the doctor. Is that [104] correct? A. Yes.

(Testimony of Mrs. John W. Nihill.)

Q. And you left instructions that "I think maybe you should go to the doctor", or——

A. No, I didn't say "I think", I said "Take her".

Q. Now, after this cold wave was given, what was done with the bottle at the time the cold wave was given?

A. Well, I had three barrels out there where I put my cans in and I threw it out in that.

Q. And how often do you dump those barrels?

A. Well, it all depends on how fast they get full.

Q. Well, that sounds like a logical answer. Normally, how often do you dump those barrels?

A. Well, I just can't tell you.

Q. What I'm getting at is——

A. Oh, in the Spring I usually clean the yard and then we haul them off.

Q. When did you get this empty bottle with cold wave solution which has been produced here in court?

A. Well you see I turned it over to—I went up to see Mr. Roney, and he asked me if I could find this bottle.

Q. And when did you first see Mr. Roney?

A. That, I couldn't exactly say.

Q. Well, approximately?

A. Well, it was after I began to get worried about Sandra's [105] hair and everything. I just can't tell you when.

(Testimony of Mrs. John W. Nihill.)

The Court: Will you identify Mr. Roney? I don't know who he is.

Mr. Packard: Yes. Mr. Roney is an attorney, your Honor. Is that correct?

The Witness: Yes, he is an attorney.

Q. And where does he practice?

A. Carrington.

Q. And is that near Kensal? A. Yes.

Q. How far? A. About thirty miles.

Q. Thirty?

A. About thirty miles. It's the county seat of our township.

Q. Now was that before graduation?

A. Oh, no. No, it couldn't have been. I just don't remember when I did go out there and get that.

Q. Well, I'm talking about when did you see Mr. Roney?

A. No, we hadn't—we weren't too alarmed about Sandra's hair even at the time of the graduation although it was—— [106]

The Court: Try to fix approximately the time when you went to see him. Relate it to some event you remember about.

The Witness: Well, I think it probably was in June maybe—after she started losing her eyebrows and eyelashes.

Q. And that's the time when you became alarmed, really became alarmed when the eyelashes—— A. Yes.

Q. About in June? A. Yes.

(Testimony of Mrs. John W. Nihill.)

Q. And at that time you went to see Mr. Roney?

A. Yes.

Q. And is that the time that Mr. Roney asked you to get the bottle? A. Yes, sir.

Q. And then in June, or sometime around in June, is that when you went back and looked for this bottle? A. Yes, sir.

Q. Where did you find it?

A. In those barrels.

Q. Were those barrels open barrels—did they have a lid on them, or——

A. They are open barrels.

Q. And I take it that you had a considerable amount of rain, it rains in North Dakota, doesn't it, like it does in [107] California?

Mr. Lanier: Not quite, counsel. (Laughter.)

Q. You probably don't remember and I am interested in knowing, but you have—what is your normal rain-fall in North Dakota—maybe I should say "snow-fall"?

A. Some days we have more and some we have less. I just don't know.

Q. Well, what is the normal—ten inches, twenty inches, fifteen inches?

A. I couldn't tell you that. The more rain, I know, the better crops we get.

Q. Did you have pretty good crops in 1955?

A. I don't remember that.

Q. And when you gave this cold wave that was being given to Sandra, you used this towel at all times, didn't you, to see that it didn't get down

(Testimony of Mrs. John W. Nihill.)

over her forehead or into her eyes, isn't that correct? A. That's right.

Q. And you took all the precautions you could to keep the solution out of her eyes?

A. We did.

Q. What is Sandra's natural color of her hair?

A. Sandra was kind of a blonde, or Sandra was a blonde.

Q. Light hair, is that correct? A. Yes.

Q. The reason I ask that is it appears now the hair she has to be light colored and the pictures appear dark. Did she ever have her hair tinted?

A. No, she never did.

The Court: Let's see the one I want—this one. At the this picture here was taken, was her hair blonde at that time?

The Witness: Well not a real blonde, but I would say——

The Court: Rather light than dark?

The Witness: Yes.

Q. (By Mr. Packard, resuming): I mean I looked at the picture and it looked like it was black and then I thought in court the hair looked blond. A. No.

Q. Do you have any beauty shops or beauty salons in Kensal? A. No.

Q. Now do you recall—did you take Sanda to Dr. Melton—did you go with Sandra to Dr. Melton? A. Yes, I did.

Q. And I take it that you had certain conver-

(Testimony of Mrs. John W. Nihill.)

sations with [109] Dr. Melton relative to her condition. Is that correct? A. Yes.

Q. And after he examined Sandra he gave a prescription of thyroid. Isn't that correct?

A. Yes.

Q. And you had that prescription of thyroid filled. Isn't that correct? A. Yes, I did.

Q. Then you stopped, or quit giving Sandra this thyroid, didn't you?

A. Yes. On the instructions she was only supposed to take them so long.

Q. Did you consult Dr. Melton before you stopped this thyroid? A. Well, no.

Q. Isn't it a fact that you felt that Sandra was getting larger around the waist and so you had her to quit the thyroid? A. No.

Q. Now, did Dr. Melton instruct you to go back and see Dr. Martin at any time, or that he would cooperate with Dr. Martin in any treatment or care to be rendered Sandra?

A. No, he did not. The only thing he said was that Sandra should go out in the sun but, above all things, not to sunburn her head. That would be worse than anything else she could do for it.

Q. Now these thyroid pills they were given orally. Is that correct? She took these pills orally?

A. Yes.

Q. Was that the only medication or treatment that she received after she saw Dr. Melton?

A. Yes.

Q. That's the only treatment she received to

(Testimony of Mrs. John W. Nihill.)

the present day, is that correct? A. Yes.

Q. What type of care does she presently give her hair insofar as shampoo or washing her hair?

A. Well, she can't brush it too much because what little she has, it falls out.

Q. Does she wash her hair?

A. She puts oil on it once in awhile. Yes she washes it.

Q. She puts oil on once in a while?

A. Once in awhile.

Q. What kind of oil?

A. She used some of this baby oil for awhile, this like you get in baby kits and she got some lanolin.

Q. Does she use shampoo on her hair?

A. Yes, Dr. Melton recommended Breck's shampoo, but we used that for many years.

Q. What type of Breck's shampoo?

A. Well there's different types. If your hair is oily you get Breck's shampoo for oily hair. If your hair [111] is normal, then you get the other kind.

Q. What type did Sandra get?

A. For dry.

Q. Was that the oily or the standard, regular?

A. Regular.

Mr. Packard: That's all the questions I have.

Further Cross Examination

Q. (By Mr. Bradish): Mrs. Nihill, you were present here yesterday when the deposition of Mrs. Brill was read. Were you not?

(Testimony of Mrs. John W. Nihill.)

A. Mrs. Briss?

Q. Briss—were you not? A. Yes, sir.

Q. And did you listen to the questions and answers that were read from that deposition?

A. Yes.

Q. Well, as I recall those questions and answers, Mrs. Briss indicated that she took the bottle of solution and put half of it in a bowl, and then poured the other half of it over Sandra's head. Did you hear that?

A. Which solution are you referring to now?

Q. From the bottle.

A. No, she did not do that.

Q. Well, did you hear that testimony of Mrs. Briss read yesterday, to that effect that she had done that?

A. I don't remember. If I did, I know she didn't do it because I was there and I saw how it was done.

Q. Now, from the time this procedure started until it was completely finished, did you leave the room at any time? A. Yesterday?

Q. No, ma'am. The procedure when the cold wave was given to Sandra? A. No.

Q. I understood on direct-examination that this delay in time involved the second ten-minute timing period in this application. Is that right?

A. Yes.

Q. And I thought I heard you say "When you came back", you found that they were taking a test

(Testimony of Mrs. John W. Nihill.)

curl and you told them that it was not yet time to do that. Is that right?

A. Yes, sir.

Q. When you say you came back, where did you come back from? [113]

A. Well, we have large kitchens in North Dakota.

Q. Well, did you come back from the same room?

A. Well, yes; I was in the same room when I came back to where they were sitting.

Q. Well, where had you been before you came back to where they were sitting?

A. Probably on the other side of the room.

Q. Do you recall that? A. Yes.

Q. Do you recall what you were doing on the other side of the room?

A. Well, I can't exactly say. Three years is quite a long time to be remembering.

Q. Yes, ma'am, but you don't have any trouble remembering exactly what took place, step-by-step, in the application of this cold wave to Sandra's head three years ago, do you?

A. Well, no; I remember that.

Q. You remember that.

A. But I am also a mother. I have family duties to attend to too.

Q. All right.

The Court: Mrs. Nihill, just answer the questions and don't try to explain your answers. It's not necessary to do that. [114]

Q. Now, I believe you told us that you went

(Testimony of Mrs. John W. Nihill.)

to the drug store in Kensal for the sole purpose of purchasing Rexall Cara Nome wave set?

A. Yes, sir.

Q. And do you recall Sandra being with you?

A. Yes, sir.

Q. And when you went in did you look at any other type of wave sets?

A. Well, Sandra had seen this Cara Nome pin curl advertisement and she learned to make pin curls and she thought she could put it up herself. That is the reason we bought it.

Mr. Bradish: Your Honor, may that answer be stricken as not responsive to the question.

The Court: It may be stricken. Ask the question again and let her answer it directly.

Mr. Bradish: Yes, sir.

Q. (Mr. Bradish, resuming): Mrs. Nihill, when you went into—this is Olig's Store, isn't it?

A. Olig's Rexall Drug Store, yes.

Q. Yes, and that's what the sign says out in front, "Olig's [115] Rexall Drug Store." Doesn't it? A. Well, I believe it does, yes.

Q. All right. You know Mr. Olig pretty well. You have for several years, haven't you?

A. Yes, I have.

Q. When you went in there to get this wave set you went in with the sole purpose of getting a Cara Nome set—you told us that?

A. Yes, sir.

Q. Now after you got in there, isn't it a fact

(Testimony of Mrs. John W. Nihill.)

that you looked at several other sets before you bought the Cara Nome set? A. No.

Q. You didn't look at any others?

A. No, sir.

Q. Were you here when Sandra testified yesterday that you looked at several sets before you decided on the Cara Nome set?

A. I don't remember her saying that. I thought the question was "had she seen", or did he have different kinds.

Q. All right. Well, now, you picked up this guarantee in the store that day. This Exhibit No. 7? This No. 7 you picked up that particular day in the store? A. Yes, sir. [116]

Q. And you went in there to buy this Cara Nome because you had used Cara Nome products for quite some time? A. Yes, sir.

Q. And you relied upon them as being safe and good products? A. Yes, sir.

Q. And you had seen them advertised in various periodicals before that time? A. Yes, sir.

Q. Is that correct? A. That's right.

Q. And there was no doubt in your mind when you went in and asked for this Cara Nome set that it was as good a set as you could get, and that's what you wanted? A. Yes, sir.

Q. And you had no doubt, did you, that the Cara Nome set would give Sandra a good wave and you didn't consider the fact that there might be some bad results from the use of that set?

(Testimony of Mrs. John W. Nihill.)

A. No, sir, I did not; if I had of I would never have bought it.

Q. But yet you picked up this guarantee and took it home with you, didn't you?

A. I just picked that up for a kind of a laugh. I never [117] thought I would ever use it.

Q. Well, did you keep it for kind of a laugh after the——

A. I have a little thing up on the wall that I stick stuff like that in—coupons, premiums and all those things.

Q. Well, did you read this guarantee when you picked it up in the drug store?

A. Yes, I did.

Q. You knew what it said, didn't you?

A. Yes.

Q. And did you feel when you picked this guarantee up that you would at any time want to come back and get double your money back?

A. No, I didn't.

Q. You didn't see anything on this guarantee, did you, that said that Cara Nome was perfectly safe and nothing would happen to anybody that used it, did you?

Mr. Lanier: If the Court please, the exhibit will speak for itself, on what it says.

The Court: Yes, that's true, Mr. Bradish.

Q. (By Mr. Bradish, resuming): Now, you have another exhibit there which, from my casual observation, appears to be a duplicate of the guarantee of Plaintiff's Exhibit 7, [118] and that is

(Testimony of Mrs. John W. Nihill.)

Plaintiff's No. 28, this little green one. On one side it has "Cara Nome Natural" and on the other side it has something, "Rexall Anapac" for cold remedy. Is that right? A. Yes.

Q. Do you recall ever seeing the other side of that little guarantee that refers to "Anapac"?

A. I must have read it, but I just don't recall——

Q. You don't recall seeing that. Do you recall seeing it on this one?

A. No, I don't remember.

Q. You don't recall seeing anything about "Anapac" on No. 7, do you? A. No.

Q. Do you see it in the back there?

A. Yes.

Q. Now, I believe you said, Mrs. Nihill, that the first time that you thought about retrieving this bottle which contained the wave solution, as distinguished from what you call the neuralizing solution, the first time that you retrieved this little bottle was sometime around about June when you saw your lawyer in Carrington. Is that right?

A. Yes, sir.

Q. Up until that time you hadn't concerned yourself with [119] preserving any of the remains of the package of cold wave, had you? A. No.

Q. Well, when was it, ma'am, that you—strike that. After this cold wave was given, what did you do with the box that the bottle and the pin curls and everything came in?

A. I suppose they probably got burned up.

(Testimony of Mrs. John W. Nihill.)

Q. Got burned up. How about the package that the neutralizer came in, that got burned up too?

A. I imagine.

Q. And isn't it a fact that after you completed the giving of this permanent everything that was left that would burn up got burned up?

A. The bobby pins we threw away because they were rusted.

Q. And the bottle, you threw out in the can box? A. Yes, sir.

Q. All right, and everything else that would burn got burned up. Isn't that right?

A. Well not everything.

Q. Well, what didn't get burned up?

A. The little guarantee slip. Like I say, I always stick them up in that little packet of a thing I have hanging on the wall.

Q. Oh, you stuck this little green thing up on the wall? A. Yes, sir. [120]

Q. And was it stuck up on the wall there along with the larger one, which is Plaintiff's Exhibit No. 7? A. Yes, sir.

The Court: Let me ask her one question here for my own information.

Where did you say that you got the little green guarantee?

The Witness: Out of the kit.

The Court: Out of the kit itself.

The Witness: Out of the kit.

Q. (By Mr. Bradish, resuming): So you had

(Testimony of Mrs. John W. Nihill.)

both the larger one and the little green one stuck up on the wall together, is that right?

A. Yes, sir.

Q. How many other things did you have stuck upon the wall there?

A. Oh, I have—save my coupons you know, like gift towel stamps and green stamps and things like where you get little premiums from, I put them all up in this little place and then when I get enough I get something for them.

Q. Well, those things you use to redeem to get some [121] merchandise.

A. Oh, well, there's other things too I stick up there.

Q. For example what?

A. Oh, well, I just can't really say.

Q. Guarantees such as this that give you your money back?

A. Yes, I put that up there, yes.

Q. You put that up there? A. Yes, sir.

Q. Now, can you tell me when in relation to the time that you gave Sandra this cold wave, when was it that you put that little green slip up there on the——

A. I put that up there that very night after we opened it.

Q. That very night after you opened it?

A. Yes, sir.

Q. And you had no reason then to have any feeling that there was going to be anything wrong with that cold wave? A. No, I did not.

(Testimony of Mrs. John W. Nihill.)

Q. When was it that you put the big one up there? A. The same night.

Q. The same night? A. Yes, sir.

Q. Did you put them both up there at the same time? [122] A. Yes, sir.

Q. Did you read them before you put them up there?

A. Well, I glanced through it, that was it. And we read them in the drug-store.

Q. You did. Now, you were the one that bought this Cara Nome kit and paid for it?

A. Yes, sir.

Q. Now, the only prior cold wave that Sandra had had was about a year and a half before this when a Toni set was used. Is that right?

A. Yes, that's right.

Q. Did Mrs. Briss also give her that?

A. She did.

Q. And then for that year and a half period, from the time the Toni wave was given until the Cara Nome wave was given, she didn't have any permanent wave in her hair at all, did she?

A. No.

Q. Did she have any—what is it you ladies call it when you go to the beauty parlor and they set your hair or something—did she have any assistance in curling her hair or keeping her hair curled at all, other than the Toni, up until the time she got the Cara Nome set?

A. No, only that she use to—at night she use to

(Testimony of Mrs. John W. Nihill.)

wet [123] her hair and pin curl it. She did that herself.

Q. I see. Now, what was the condition of her hair at the time that this Cara Nome wave was given on February 5, 1955? And by that I mean, what was its condition insofar as being curly or straight? A. It was straight.

Q. It was straight. And she wore it in a pony tail? A. She did.

Q. How long before February 5th had her hair been straight and worn in a pony tail?

A. I just can't say—for quite some time.

Q. Well, would it be three or four months?

A. Maybe six months.

Q. Six months. So for the last six months before she got the Cara Nome wave, her hair was straight and worn in a pony tail. Is that right?

A. That's right.

Q. Were you here in Court when this picture which bears "Plaintiff's Exhibit No. 31" was offered in evidence? A. Yes.

Q. Were you here when the photographer testified that that was taken in January of 1955?

A. Yes. That was taken on January 20, 1955.

Q. January 20, 1955. That would be about fifteen days [124] before she was given the Cara Nome treatment. Is that right? A. That is right.

Q. Is her hair, as it is shown in that picture, what you commonly refer to as being worn in a pony tail?

(Testimony of Mrs. John W. Nihill.)

A. Yes, it's quite long in the back; you can't see it from here.

Q. Would you say ma'am, that the hair shown in that picture is straight?

A. No, it is not straight, but it's curled because of the pin curls that she put in it.

Q. Now, when you went in to this drug-store to get this Cara Nome, you went in there to buy that particular kind because you wanted to get the best for Sandra's hair, didn't you?

A. Yes, and besides it was a pin curl and she had learned to make pin curls and she thought she could put it up herself, but Mrs. Briss said she would come over and help her.

Q. Well, the results of the Toni that she had had a year and a half before this one, I believe you said it was beautiful? A. Yes, it was.

Q. You didn't go back to get another Toni set?

A. No. [125]

Q. Now, you told Mr. Lanier that you notified this druggist about the results of this wave that Sandra had? A. Yes.

Q. You did that at the time that you had him fill the prescription for this selsum?

A. Yes, he knew at the time I filled the prescription that her hair was starting to fall out.

Q. And that was about when ma'am?

A. Well they got the prescription on the 28th of February, 1955.

Q. 28th of February? A. Yes.

(Testimony of Mrs. John W. Nihill.)

Q. And you told him then that her hair was starting to fall out? A. Yes.

Q. And you watched Sandra's progress insofar, or you watched her condition as it developed over the months from February 28th on up until the time you saw your lawyer in June over in Carrington, didn't you? A. Yes.

Q. And isn't it true that during that entire period of time that her hair kept coming out more and more and she kept having less and less hair?

A. Yes.

Q. That was through March, April and May—three months, is that right? A. Yes.

Q. And just before you left for Seattle, you told somebody in your family to take Sandra to Dr. Martin, which was done on February 28th?

A. That's right.

Q. And you returned Mrs. Nihill sometime before March 16, 1955? A. That's right.

Q. And from March 16, 1955, up until June, you knew that Sandra's condition was getting worse, didn't you, from what you observed?

A. Yes. I never heard of such a case like that before. I couldn't make myself believe that it wouldn't come back.

Q. Well, Mrs. Nihill, before you left for Seattle, you told somebody to take Sandra to the doctor because her hair was coming out. Isn't that right?

A. That is right.

Q. All right. Now, from the time you returned on the 16th of March up until the time she went

(Testimony of Mrs. John W. Nihill.)

back to Dr. Martin for the second time on July 6th, during that [127] period of time, March 16th until July 6th, did you ever once ask—suggest—or take her to Dr. Martin for further observation and treatment? A. No, I didn't.

Q. And then I believe that you went to Fargo with Sandra to see Dr. Melton?

A. That is right.

Q. And you first went there I believe it's testified on August 9, 1955? A. That's right.

Q. Did you go with her every time she went?

A. Yes, sir.

Q. How many times did she go in all?

A. We have seen Dr. Melton I believe about four or five times.

Q. And isn't it true that the last time that she went to Dr. Melton was in sometime in September of 1955?

A. Well, I believe we had seen him later than that, but that was one of the last times, yes.

Mr. Packard: It was the 21st, my birthday.

Q. I remember now, when that date was read from the deposition, I think it was September 21, 1955, because Mr. Packard told me it was his birthday. All [128] right, Doctor Melton has testified that the last time he saw Sandra for treatment at all was on September 21, 1955. Would you say that that is correct from your recollection?

A. Well I can't exactly say. I haven't got my books here or anything.

(Testimony of Mrs. John W. Nihill.)

Q. Well, as near as I can figure it, Mrs. Nihill, from August 9, 1955, until September——

The Witness: Mr. Lanier, when was that new medical building built?

Mr. Lanier: Sorry, I can't answer.

Mr. Bradish: You know if you ask him that question he will have to get up there on that stand and I'd love to have him up there. (Laughter.)

A. I can't just exactly say, but they built a new building in Fargo and—farther out—and they had just moved in there and we took Sandra there the last time and at that time he said he could see very little difference.

Mr. Bradish: Counsel, will you stipulate that the last time this lady was seen by Dr. Melton was in September of '55?

Mr. Lanier: I believe that's correct, counsel.

The Court: September 21st?

Mr. Bradish: September 21, 1955. Thank you.

Q. Now, Mrs. Nihill, since September 21, 1955, until the other day when Sandra went out here to Dr. Levitt, during all of '56 and all of '57 and all of '58 up to the present time that she went to Dr. Levitt, during that two years and some six or seven months, did you ever take Sandra to Dr. Martin or to Dr. Melton or to any other doctor for treatment or observation of her hair condition?

A. No.

Q. You did take her, ma'am, over to Minneapolis, did you not? A. Yes.

Q. And she got a hair piece over there?

(Testimony of Mrs. John W. Nihill.)

A. We took her to see this Dr. Starr in Minneapolis too.

Q. Not Dr. Starr, you mean Dr. Michelson?

A. Michelson.

Q. That was in the middle of March of 1956. All right. Dr. Michelson examined her on that one occasion? A. That's right.

Q. But, other than the examination by Dr. Michelson, she had no attention—medical attention—for her hair [130] condition from September of '55 until she was examined by Dr. Levitt here the other day. That's a correct statement, is it not?

A. I believe that is right.

The Court: When was Dr. Michelson's examination?

Mr. Bradish: Dr. Michelson's was in March of 1956, your Honor.

The Court: Do you remember it that way?

The Witness: Yes, I believe that's right.

The Court: Very well.

Q. (By Mr. Bradish, resuming): Do you remember, Mrs. Nihill, the magazine or periodical in which you say you read something about Cara Nome products?

A. Yes, I believe it was the Farm Journal.

Q. You believe it was the Farm Journal?

A. Yes.

Q. Do you know when it was, approximately?

A. Oh, they have advertisements in there right along.

Q. Well, I'm restricting my question now to

(Testimony of Mrs. John W. Nihill.)

Cara Nome products. When was it, if you know, that you ever read anything about Cara Nome products in the Farm [131] Journal?

A. Well, I think practically every time they came out they had some Cara Nome products in their advertising.

Q. And how often does the Farm Journal come out?

A. I believe it's once a month, I'm not sure.

Q. Well, did you at any time before February 5, 1955, read anything about Cara Nome products in the Farm Journal? A. Yes.

Q. When before that date?

A. It must be maybe '54, part of '53.

Q. Do you recall that or are you just guessing?

A. No, I am not guessing, I'm telling.

Q. You're telling. You're telling because you recall it? A. Yes.

Q. All right. What do you recall reading about Cara Nome products?

A. Well I can't just exactly say because I don't memorize all those things, but they usually have a list of their products, Rexall products and Cara Nome products, but always down at the bottom of the page there is this big letter writing "Rexall Drug stands behind all its products," or something to that effect.

Q. And you relied on that, didn't you? [132]

A. Yes, I did.

Q. And is it because you relied upon what you read in those ads in the Farm Journal that Rexall

(Testimony of Mrs. John W. Nihill.)

Drug stands behind all its products, is that the reason that you took this guarantee home and stuck it up on the board at home? A. No.

Mr. Lanier: If the Court please, that's objected to as argumentative.

The Court: Sustained.

Mr. Bradish: That's all. Thank you very much.

Mr. Packard: Mr. Lanier, I have just a couple of short questions that may facilitate things.

Mr. Lanier: It's all right with me, counsel.

The Court: Well, proceed.

Recross Examination

Q. (By Mr. Packard): I just wanted to clear up one thing. I am not certain whether you testified to—but I don't recall— [133] whereabouts in your house did this cold wave begin?

A. We were in the dining-room by the dining-room table when we started to wind the pin curls up and we later had to move to the kitchen because the men wanted the dining-room table to play Whist on and that's where it was given.

Q. And Sandra never did complain about any stinging or burning sensation to her scalp or complain about the giving, did she, at any time?

A. No, she did not.

Q. And she never complained about any of the solution getting in her eyes? A. No.

Mr. Packard: That's all.

(Testimony of Mrs. John W. Nihill.)

Redirect Examination

Q. (By Mr. Lanier): Mrs. Nihill, I just have one thing I want to get squared away. On cross-examination, you were asked if at the time of your deposition in Jamestown, the following questions were asked you and you gave the following anskers. The questions being——

"Q. And where was this solution at the time?

A. Well, it was in the bottle. I guess that's where it was. Then she poured it into the [134] dish, or half of it rather. That is the way it is supposed to be.

Q. And then after that what was done next?

A. Well, then it was allowed to stand so long, and she went out to the sink and the rest of it was poured on over her head."

Those are the questions and answers that were asked you and you answered that if it's there I presume I did. Now, I want to ask you the immediate three questions preceding those which were asked you by counsel and ask you whether or not at the time of the giving of this deposition, in reading all of them, completely, together, these questions were asked and you gave these answers:

"Q. And what was done then, was it pinned up and then what?

A. Well, I just can't say for sure, but I think it was. She let it set for a little while, and then she put this neutralizer on it, or whatever, and that sit so long, and then she poured the rest of it over it.

(Testimony of Mrs. John W. Nihill.)

Q. Did you help in putting the stuff on the hair? A. No, I was the timer.

Q. And how did she put the solution on the hair first? A. With a piece of cotton. [135]

Q. And where was this solution at the time?

A. Well, it was in the bottle. I guess that's where it was. Then she poured it into the dish, or half of it rather. That is the way it is supposed to be.

Q. And then after that what was done next?

A. Well, then it was allowed to stand so long, and she went out to the sink and the rest of it was poured on over her head."

Now, is that the complete sequence, those questions and answers that you gave at that time?

A. I believe they must be if they are written down that way.

Mr. Lanier: Thank you.

The Court: Is that all, gentlemen? You may step down.

(Witness excused.)

The Court: The jury may be taken out and stand in recess for ten minutes.

(Thereupon, a ten-minute recess was taken and, thereafter, the following proceedings were had in open Court:)

Mr. Lanier: Please the Court, at this time I would like to call [136] Mr. Lewis back to the stand for cross-examination under the Rule.

Whereupon,

MR. ARNOLD L. LEWIS

having been previously sworn, resumes the witness stand for further cross examination, as follows:

Further Cross Examination

Q. (By Mr. Lanier): Mr. Lewis, on Tuesday, you told me you would make an effort to find Mr. Monteau, your ex-chemist's, address. Have you made that effort? A. Yes, I did.

Q. Did you find it? A. No, sir.

Mr. Lanier: That's all I have, your Honor.

(Witness is excused.)

Mr. Lanier: At this time, may it please the court, may I have the original deposition of Mrs. Donald Carlson first, and then Mrs. Carl Carlson.

(The Clerk furnished the deposition in question to counsel.)

Mr. Lanier: Counsel, would you be Mrs. Donald Carlson first please?

Turn to page 3, counsel. [137]

DEPOSITION OF MRS. DONALD CARLSON

(Thereupon, the testimony of the witness for the plaintiff, Mrs. Donald Carlson, given by deposition on August 1, 1957, in Jamestown, North Dakota, was read before the court and jury, Mr. Lanier reading the questions and Mr. Rourke reading the answers, as follows:)

Mr. Lanier: "Mrs. Donald Carlson, a witness called at the request of the plaintiff, being first

(Deposition of Mrs. Donald Carlson.)
duly sworn to testify to the truth, the whole truth, so help her God, thereupon testified as follows:

Direct Examination

Q. (By Mr. Lanier): Would you state your full name, please? A. Mrs. Donald Carlson.

Q. Where do you live, Mrs. Carlson?

A. Spiritwood, North Dakota.

Q. Spiritwood, North Dakota being in what county? A. Stutsman, isn't it?

Q. And in what county is Kensal, North Dakota? A. Stutsman.

The Court: What is her name?

Mr. Rourke: Mrs. Donald Carlson. [138]

Q. And about how far are you from Kensal, North Dakota?

A. Oh, approximately, maybe forty miles, something, either way.

Q. Calling your attention to sometime in March of 1955, did you have any occasion to be in the Rexall Drug Store in Kensal, North Dakota?

Mr. Bradish: Just a minute. I'm going to object to the question. That question and all of the questions and answers that follows that, on the ground that they are not material, and there has been no foundation laid for any materiality between the visit of this witness to the Rexall Drug Store in March of 1955, and the issues presented by the pleadings in this case concerning a bottle of Cara Nome that was purchased in February of 1955. The deponent here is in no way a party to this

(Deposition of Mrs. Donald Carlson.)

action or, to my knowledge, any other action, and what this witness did in the drug-store in March 1955 is most certainly not material to the issues in this case.

Mr. Packard: I join in the objection, your Honor, on behalf of [139] the defendant Arnold L. Lewis.

Mr. Lanier: It couldn't possibly be anything at this point, but preliminary, your Honor.

The Court: Well the preliminary inquiry demonstrates pretty well the ultimate purpose, and I am inclined to think the objections are quite proper.

Mr. Lanier: Well, now, may it please the Court, I want to be heard at length on that objection.

The Court: Counsel will want to go in chambers I presume, out of the presence of the jury.

Mr. Lanier: Yes, sir.

The Court: We will retire to Chambers.

(Whereupon, the Court, counsel for the respective parties and the reporter retired to Chambers where the following proceedings were had out of the hearing of the jury:)

In Chambers

The Court: All right, Mr. Lanier. [140]

Mr. Lanier: May it please the Court, my position is this. You have here a legal inference. You have a small town—the foundation in the record goes to show that it is a small drug-store and the only drug-store in the city. That you have a small town of from three hundred to three hundred and

fifty people. You had a purchase made at approximately the same time, the purchase was made within thirty days, from that drug-store. Now, then, counsel is now objecting to the weight of the evidence, not to its admissibility. The jury has a right to be able to take the inference from all these circumstances that, if they purchased the same product, and had a result from which hair came out, which the depositions show, the jury has a right to take their inference as to whether or not there was something wrong with the product and, to deny the plaintiff to do that, to me would be clearly, under every decision of evidence——

The Court: Can you show that it's from the same lot, Mr. Lanier?

Mr. Lanier: It's impossible, your Honor, to show it from the same lot. It's utterly impossible, but it is the same product; it's manufactured by the same people, the [141] defendant Studio Cosmetics. It's distributed by the same Rexall. It's in the same area. For instance, Mr. Lewis has himself already testified in the record that Batch 181 for instance was put out in thousands of bottles. It was first put out to Chicago, and from there it has to go out in this area. It's totally untenable to presume that this little druggist in that short period of time could even be buying from another batch; that that batch comes in all at once. Now I ralize for awhile all their arguments as to its weight are there, but what counsel is doing now is objecting to weight, he is not objecting to admissibility, and to deny the jury the right for its

inference as to this product, to me would be prejudicial error.

Mr. Packard: May I be heard? I think I can clear this whole thing up, your Honor. On page 4, line 5, the question was asked the witness, in the deposition I'm reading of Mrs. Donald Carlson:

"Question—And did you make a purchase at the Kensal Rexall Drug Store of a Cara Nome Home Permanent wave set?

Answer—Yes, sir."

Now the evidence is clear that there are various types of Cara Nome home wave sets. This was a pin curl set [142] out of lot 181. I am not certain—I just don't recall what the evidence is at the present time, but Cara Nome puts out four different—three different—one of them is for natural curl, I think I made that in my opening statement; they put one out for a pin curl. This is a special type where they just put the pin curls. Then they have one for bleached hair and for dyed hair, tinted hair and so forth, and they use different strengths for the various types. They call one the mild, for people that have hair that tends to break off, or where they have had bleaches and tints. So this deposition—all they've established—she bought a permanent wave set and it doesn't pin it down to a pin curl, the same type of set that this young lady had, so, therefore, there's no proper foundation. Just that particular basis, that it wasn't the same type, not even shown it was the same lot.

Mr. Bradish: I think there is something a little

more important than that, although I think that is important.

Mr. Packard: And the contention under which—whether the directions were followed by this Mrs. Carlson—we would be trying three separate lawsuits here to see that the two Carlsons followed the directions, applied it exactly the same way that Sandra did, and had the same [143] results, and so forth. In order to show subsequent accidents or subsequent occurrences for certain limited purposes, it may be admitted, but you have to lay the foundation to show that the circumstances were substantially the same, and there is no foundation here to show the circumstances were substantially the same, from which the jury could draw any reasonable inference from any evidence which would be offered by way of these depositions, and upon those grounds we strenuously object to the introduction of these depositions because it would permit this jury to guess and speculate.

The Court: Do you want to say anything?

Mr. Bradish: I wanted to say basically that, your Honor. We don't know in what manner these two ladies applied the particular wave set that they bought. We don't know which type of wave set it is. We don't know whether they followed the directions or whether they didn't follow the directions, and I think the Court will take judicial notice that with these wave sets, if you don't follow the directions, you might have some bad results. Again, counsel in his opening statement, referred to the results that these ladies [144] had, which were

obviously and admittedly different than the results that this little girl claims to have had. These ladies had their hair to split off and they had it trimmed and then it grew out, and it was perfectly all right. In the case at bar, there is a claim that the wave solution used by this little Sandra Nihill caused her to lose her hair and caused her to have a permanent condition now of baldness or partial baldness. There is just no connection. If this sort of thing were permitted, counsel would be permitted to go all over the country and find anybody who claimed they had a bad result from Cara Nome wave set and put them on and I think a good analogy is our rule of law, and I would assume it's the rule of evidence in your Honor's jurisdiction, that in cases of subsequent acts and repairs, they are not admissible to establish prior negligence and the condition of subsequent batches of this solution, if they could establish that they were of the same component parts, as the solution in question, would not be admissible to show that that batch in question was bad. There is just no foundation for this evidence and I am equally as convinced as Mr. Lanier appears to be that the admission of this evidence in a lawsuit of this type would be clearly prejudicial error. I can't see how [145] he can sincerely contend that it is admissible. I don't know what legal inference he says the jury is entitled to draw unless it seeks inference that the bottle that these ladies bought in March was from the same batch that they bottle that little Sandra bought, but I don't think that that makes any difference. Even

if he could prove that it was from the same batch —he can't and hasn't—but if he could prove it was from the same batch, I still don't think that the results that these ladies claim to have had from that wave solution would be admissible in trying to establish that the whole batch was bad.

Mr. Lanier: Now, may it please the Court, in answer to that—let's do them one at a time. First of all, counsel tries to make an analogy between this situation and that of subsequent repairs, to which of course there is no analogy. Subsequent repairs are of course outlawed and thrown out on the grounds that they can not serve as admissions. Again, they are arguing the weight. Of course, that's the ground upon which they go out. Now, as to counsel's first statement, which I don't think, again, it would make a bit of difference as to what kind, whether it was a pin curl or regular. You're depending upon the name, you're depending upon the advertising and the warranty and the guarantee that goes with it. Now, if the product itself is [146] bad and has the same type of results of losing hair, that—and for its weight—is entitled to go to the jury; but that isn't the point at all because if the Court would go further in the deposition, for instance on page 7, of Mrs. Carl Carlson, you will find out that it was the same.

"Q. Now, would you tell the jury what was the condition of your hair, and when, after the application of the Cara Nome Rexall home wave?

A. You mean when I took the bobby pins out?

Q. Yes.

A. Well, your bobby pins were all rusty, and your hair, if you are going to comb them out—and so forth."

Now, therefore, of course, we have a pin curl wave. There can't be any question about that. It's their pin curl wave——

Mr. Bradish: I don't recall any evidence that only a pin curl has the bobby pins.

Mr. Lanier: Well that, of course, would be easy to get. If we are going to go into all of that and that's something, between counsel, that we all know——

Mr. Packard: I don't know. [147]

Mr. Lanier: Well, we can put the proof on on that, if that's all that's necessary.

Mr. Packard: I think that's one of the things, but I think there's more important things than that. I'm sorry to interrupt you, Mr. Lanier.

Mr. Lanier: Now, next, when they are talking about whether or not directions were followed. Both of them were asked questions such as this—

"Question: And do you know whether or not you meticulously followed the rules that were laid out for the timing in the directions?

Answer: Yes, we did follow that correctly."

Now, they had a lawyer at this deposition. He has cross examined. He had a perfect right to go into that. The argument that we are trying two lawsuits is almost amazing, your Honor, because that's why they have notice—that's why they have a lawyer there. He has a full right to examine on to how they were used and if they followed them

and if they were acquainted with them and so forth. There just isn't any weight to it at all. [148]

Mr. Bradish: Where are you reading from?

Mr. Lanier: That was on page 6, as it happens, of Mrs. Carl Carlson. It's in both of them.

Mr. Rourke: There is cross examination on this.

Mr. Lanier: And of course there is cross examination on it, on how they followed the rule. To me, your Honor, it's elemental. As a matter of fact, it's so elemental that I didn't even bring cases on it, because here you have a product purchased at the same time of the same trade-name and apparently of the same thing. And you have the same harmful results. The degree of the result may be entirely different, but it is certainly admitted for whatever it is worth. The objection goes entirely away.

Mr. Packard: Objections are reserved until time of trial in a stipulation. I call the Court's attention to that.

Mr. Lanier: But, of course, the Court I'm sure is well aware that there are only very very few objections that can be made and that only goes to materiality. I'm not questioning your right to object to this, or whether [149] objections are reserved or not. It only goes to the materiality of the proof itself whether it's admissible or not admissible——

Mr. Packard: It goes to each question. If the question isn't properly framed, other than—it's a foundation for the taking or reading or using the deposition. That was the only thing that was waived,

and I take it the usual stipulation, all objections are reserved at the time of trial except as to the form of the question.

Mr. Bradish: This objection, at least insofar as the Rexall Drug Store is concerned, is directed at the admissibility of the evidence, and certainly not as to any weight.

Mr. Lanier: Counsel, I don't question your right —so we understand each other—on this particular objection, at this time, to make this objection at this time, I don't question this.

Mr. Packard: I don't know whether our objection has been stated in the record or not, but we object upon the ground there is no proper foundation laid for the reading of this deposition or taking of the testimony in this deposition. [150] Further upon the grounds it's immaterial, irrelevant and incompetent and doesn't tend to prove any of the issues.

The Court: I'm inclined to—Mr. Lanier seems to be so very confident of his right here—personally I think it would be a reversible error to let them in, but if it is improper Mr. Lanier, I'm——

Mr. Lanier: If it was for that reason, your Honor, I wouldn't want it in. I wouldn't be in a position, in the present condition of the case, I wouldn't be putting myself——

The Court: In these matters, it's never very wise to rely upon the elemental nature of a question of that sort unless it's important. If you insist on reading it, Mr. Lanier, I'll let you read it.

Mr. Lanier: Well, I would like to read it, your Honor.

Mr. Bradish: Did I understand it, was it your Honor's expression that you felt that the admission of this testimony would be reversible error?

The Court: I said if I was in error about it, it would be reversible error, in permitting it to go in.

Mr. Bradish: I think just so that—since I am accused of inviting error, I think that I should say, for the record, and this most certainly is not in the form of any threat, but I think I should say for the record that in the event of an adverse verdict, insofar as my client is concerned, I fully intend to take an appeal.

The Court: Well, there's no doubt of that. Now, then——

Mr. Lanier: Also, your Honor, because of the Court's feeling on it, and prior to going with this, while, as far as that's concerned, I have every confidence in it, and I do understand the feeling of the court—and if I did not have confidence in it, I certainly would not want the record to be prejudiced at this time, however, I think possibly, also, I think that I should perhaps do one more thing by way of foundation, which I can do very quickly which, at this time, I think when we go out I'll make my record and withdraw this witness at the time and do that, then perhaps the Court may feel a little bit better also about it.

The Court: Well I don't think so; but you——

Mr. Bradish: Your Honor, may I suggest [152] one more thing—we're here, the lady is here with

her pencil and her machine. If counsel is going to proceed to read these depositions, there are going to be other objections as to questions calling for the conclusion of the witness. Could we possibly go through them now and make those objections now so that we don't have to be in a position of jumping up and down and up and down in the courtroom——

Mr. Lanier: I have no objection.

Mr. Packard: I object to each and every question. Maybe we can have a stipulation that the objections we've stated go to the reading of the deposition and each and every question. I don't like to jump up and object anymore than I have to, but I do want to protect my record.

The Court: Mr. Bradish has some special objection.

Mr. Bradish: Yes, there are additional objections other than the materiality as to certain questions in here. They are based on materiality and also an additional ground—I was specifically thinking of this one here, a question on page 6—— [153]

Mr. Lanier: Which one are you on, counsel?

Mr. Bradish: On Mrs. Donald Carlson, page 6, let's start over at—I think if your Honor reads this deposition you will see that objections are made to practically every question in them by the attorney present. Question on line 1—

"Question: All right. Now, will you tell me whether or not you followed those directions?

Objection.

Answer: Yes.

Question: Did you follow the directions meticulously and carefully?

Answer: Yes.

That's objected to.

Mr. Lanier: No, it's not objected to.

Mr. Packard: "Just a moment," he says, "We object. No proper foundation." Apparently the objection came after the answer.

Mr. Lanier: There is no motion to strike.

Mr. Packard: Well, anyway we still have that right. [154]

The Court: Those plainly are asking for conclusions of the witness. Unless he follows it up by asking her to tell what she did.

Mr. Packard: That's the point.

Mr. Bradish: Then in the very next question—

"Question: Now, thereafter will you tell me the result of that permanent wave to your hair?"

Again, I'd have to object to that as being her conclusion as to what the result was. I might say "Ask her what happened to her hair."

Mr. Lanier: One moment. Now, where are you now?

Mr. Bradish: I'm still on page 6.

Mr. Lanier: Now, your Honor, before we get into these, so that there won't be any question which will come up repeatedly as these are going on, the form of the question is entirely waived at the time of taking of the deposition, the reason for it, of course, is clear——

Mr. Bradish: It doesn't say so. [155]

Mr. Lanier: I don't care what it says. The Fed-

eral Rules require it. The reason for it, of course, is clear. That one can not have a deposition taken and, at a later date, when, if an objection had been made to the form of the question, and lets the form go in, so that had the objection come in, the question could have been reframed, it's universally, of course, held in the Federal Practice, that those objections to the form of that question are out. Now, for instance, when you come in with an objection for a conclusion, after a deposition is taken, that objection is not good and valid to a deposition at this time. Materiality objections of course are good at this time. No foundation. They can still object to it at this time. But as to questions —leading questions—which is exactly in the form of a conclusion. Now, when counsel comes to the question here, "Now, therefore, will you tell me the result of that permanent wave to your hair?", if there is an objection to that, and the form of that question, it can only be that it is calling for a conclusion of the witness. There is no such objection by Mr. Jungroth there. He is objecting to relevancy and the proper foundation. [156]

Mr. Bradish: Mr. Lanier, would you turn to page 2 of Mrs. Donald Carlson's deposition, and this is you talking:

"Now, for the record, may it show that the deposition of this witness is taken pursuant to stipulation by and between all of the attorneys for the plaintiff and the defendants, without further notice;

That it is further stipulated that the witness may

be sworn in by P. W. Lanier, Jr. of Fargo, North Dakota, a notary public in and for the State of North Dakota, and that the respective counsel waive any necessity for any further certification in the deposition or record for administering of the oath;

May it further be stipulated that all the parties hereto, by and through their respective counsel, waive the necessity of the reading or signing of the deposition by the witness, and that the same may be used by either party at the trial, subject to any objections that may be made at that time not going to the foundation for the taking and reading and using of the deposition, is that all right?

Mr. Jungroth: We so stipulate."

Mr. Lanier: Subject to any objections that may be taken at that time. [157]

Mr. Packard: All right, we're taking objection.

Mr. Lanier: Under your Federal Rules you may not take those objections which go to the form of the question. The reason for it is very simple——

The Court: I don't agree with Mr. Lanier. I think that, under that stipulation, you have a right to make any objection that goes to the propriety of the question and answer with reference to the form as well as to foundation. I think that just adds fuel to the fire that you get by going into this whole thing at all. As I think about that, there are so many elements that enter into the making out of a case, and the defense as to the particular case. For example, one of the defenses that they have here, which is a very logical defense, whether

they've done anything or will do anything towards establishing or not is beside the point, and that is a systemic condition or an allergy or anything of that sort might well effect the result of using the substance of this particular pin curl solution. As I think about it, Mr. Lanier, I'm going to reverse myself and not let you read it at all. [158]

Mr. Lanier: All right, at this time, may it please the Court, may I make an offer of proof?

The Court: Yes, you may do that.

Mr. Lanier: Now comes the plaintiff and offers proof by the depositions of Mrs. Donald Carlson and Mrs. Carl Carlson, taken at Jamestown, North Dakota, August 1, 1957, and offers to read said depositions and both of them into the record and that said both depositions be made a part of the record herein for the purpose of this offer of proof.

Mr. Packard: To which there's objection to the offer of the depositions on behalf of the defendant, Arnold L. Lewis.

Mr. Bradish: And the defendant Rexall.

The Court: Which objections have heretofore been stated by respective counsel and those objections are sustained and the offer is denied.

Mr. Bradish: Now, counsel, just one more thing, do you have anything else, or do you plan to rest?

Mr. Lanier: No, I'm going to put on—when we go in I'll offer some more foundation. [159]

Mr. Bradish: Oh, I see. Well, your Honor, that's why I asked the question. I thought if he was through now, I would suggest possibly the jury could be sent home because we have some motions

to make before your Honor that I imagine will take possibly the better part of an hour or so. If you're going to finish tonight, then maybe we can make them the first thing in the morning.

The Court: How long will your witnesses take, do you have any notion?

Mr. Packard: Well, I imagine it will take—I have a doctor—I imagine a full day anyway, probably a day and a half.

The Court: Probably have to run over the week-end?

Mr. Packard: Oh, yes, yes.

The Court: You want to get through with your witnesses tonight?

Mr. Lanier: I will get through this afternoon, I'm almost sure of that.

Mr. Packard: I would suggest, if it meets with your Honor's approval, [160] that perhaps the jury not return until eleven o'clock in the morning and the lawyers can get here at ten and we can make our Motions before your Honor at that time.

(Whereupon, the Court, counsel for the respective parties and the reporter returned into the courtroom where the following proceedings were had in open court:)

Mr. Lanier: Please the Court, at this time I would like to call Mr. Lewis back to the stand again.

Whereupon,

ARNOLD L. LEWIS

resumed the witness stand, for further cross examination, as follows:

(Testimony of Arnold L. Lewis.)

Further Cross Examination

Q. (By Mr. Lanier): Mr. Lewis, there is no question but that the batch tested for the purpose of this lawsuit, and conceded by all of us, is batch 181? Is that correct?

Mr. Packard: Well, I object to the form of the question—"the batch tested for this lawsuit." I expect to have evidence of maybe other batches and so forth. I think if he frames the question that batch 181 was tested, I have no objection to that, but I mean it assumes facts not in evidence. [161]

Mr. Lanier: If the Court please, I'm going by the opening statement of counsel when he told this jury that this was a purchase from batch 181.

The Court: Is there any question about that?

Mr. Packard: No, you told me that.

Mr. Lanier: I'm going by your statement to the jury, counsel.

The Court: All right, then, there's no dispute about it. Proceed.

Q. (Mr. Lanier, resuming): Is Batch 181 the batch you and I are speaking of in this lawsuit of Cara Nome Pin Curl Permanent?

A. It is now, yes.

Q. All right.

Mr. Lanier: That's all, your Honor.

(Witness excused.)

Mr. Lanier: Mrs. Nihill would you please take the stand again?

Whereupon,

MRS. JOHN NIHILL

resumed the witness stand for redirect examination, as follows: [162]

Redirect Examination

Mr. Lanier: At this time, I want Plaintiff's "F" marked for identification.

Clerk: Plaintiff's Exhibit 34 marked for identification.

(Thereupon, Plaintiff's Exhibit No. 34 is marked for identification.)

Q. (By Mr. Lanier): Mrs. Nihill, I show you Plaintiff's Exhibit 34. Will you tell me when you went back into Kensal at the Rexall Drug Store and purchased that exhibit?

Mr. Bradish: That's objected to as being leading and suggesting and assuming facts not in evidence.

Q. Did you go back to Rexall Drug Store at the insistence of Mr. Roney, your lawyer at Carrington, and make another purchase?

Mr. Bradish: That's objected to on the grounds it's leading and suggesting.

The Court: She may answer.

A. I did.

Q. And when did you do that?

A. I just can't say to the date, but it was after [163] Sandra lost her hair.

Q. And as you stated in your previous testimony, that was around the first part of June?

A. Yes, I believe that's right.

(Testimony of Mrs. John Nihill.)

Q. And is this the kit that you purchased?

A. Well, that looks like it, yes I believe it is.

Q. Would you open the kit and take the solution bottle out of it?

(The witness opened the kit and took the solution bottle out.)

Q. Now, would you look at that and tell me what the number, the little red number, in the corner of it, is? A. 181.

Q. Thank you. Put it back in the kit please.

The Court: And when did you purchase it?

Mr. Lanier: About the first of June, your Honor.

The Court: I'm asking the witness. When did you purchase it?

The Witness: About the first of June.

Mr. Lanier: The year on that also? The first of June of what year?

The Witness: It would be 1955. [164]

Mr. Lanier: At this time, may it please the Court, I offer into evidence Plaintiff's Exhibit No. 34.

Mr. Packard: I have no objection.

The Court: Exhibit 34 will be received.

(Whereupon, Plaintiff's Exhibit No. 34, previously marked for identification, Plaintiff's Exhibit No. 34, was received in evidence and made a part of this record.)

Mr. Lanier: Now, the little bottle which has been marked but which has never been offered.

(The Clerk furnished the article counsel requested.)

(Testimony of Mrs. John Nihill.)

Q. (Mr. Lanier, resuming): Now, Mrs. Nihill, I show you Plaintiff's Exhibit No. 5, which you have previously, to save time, testified to as the bottle that you used to give the permanent to Sandra Mae and you testified that you put it in the garbage can or the trash can, and you testified that after seeing your lawyer in Carrington, that you retrieved it. Is that the bottle or not that you gave me?

A. Yes, it looks like it, yes. [165]

Mr. Lanier: At this time, may it please the Court, I offer into evidence Plaintiff's Exhibit 5.

Mr. Packard: No objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 5, previously marked for identification was received in evidence and made a part of this record.)

Mr. Lanier: I call the attention of the Court, that Exhibit 5 now in evidence, the one used, is 181.

Your witness.

Recross Examination

Q. (By Mr. Bradish): When you went back to —I assume you went back to Olig's drug store to get this second kit,—in June, around June, didn't you? The one counsel just showed you here?

A. Yes.

Q. Plaintiff's Exhibit No. 34? A. Yes.

Q. That was after you first saw your lawyer in June? A. Yes. [166]

Q. And you got that at the same drug store where you got the original one. Is that right?

(Testimony of Mrs. John Nihill.)

A. I bought that at the same drug store.

Q. Did you talk to Mr. Olig when you went there in June to buy this particular package?

A. He knew I was buying it, yes.

Q. Did you tell him that you were going to file a lawsuit at that time?

Mr. Lanier: Objected to as totally immaterial and argumentative, your Honor.

The Court: The question was, did you talk to Mr. Olig when you were there?

The Witness: Yes.

The Court: Proceed.

Q. (Mr. Bradish, resuming): And you had previously testified, that you told Mr. Olig sometime after the application of this cold wave solution, that Sandra's hair was coming out. Is that right?

A. Yes, sir.

Q. When you went there in June to get this second bottle, did you tell Mr. Olig that you were going to sue somebody about this? [167]

Mr. Lanier: Objected to as argumentative and immaterial.

The Court: She may answer. Did you tell him that?

The Witness: I don't remember whether I did or not.

Mr. Bradish: That's all.

Mr. Packard: I don't have any questions, your Honor.

Mr. Lanier: That is all.

(Witness excused.)

Mr. Lanier: At this time, may it please the Court, may I call Mrs. Carlson back to the stand again? The original deposition.

The Court: You may call him back.

(Mr. Rourke took the witness stand to read the answers.)

Mr. Lanier: Would you take the deposition of Mrs. Donald Carlson please.

Thereupon,

DEPOSITION OF MRS. DONALD CARLSON

a witness for the plaintiff, taken in Jamestown, North Dakota, August 1, 1957, was read, Mr. Lanier reading the questions and Mr. Rourke reading the answers, as follows: [168]

"Q. (By Mr. Lanier): Would you state your full name, please? A. Mrs. Donald Carlson.

Q. Where do you live, Mrs. Carlson?

A. Spiritwood, North Dakota.

Q. Spiritwood, North Dakota being in what county? A. Stutsman, isn't it?

Q. And in what county is Kensal, North Dakota? A. Stutsman.

Q. And about how far are you from Kensal, North Dakota?

A. Oh, approximately, maybe forty miles, something, either way.

Q. Calling your attention to sometime in March of 1955, did you have any occasion to be in the Rexall Drug Store in Kensal, North Dakota?"

Mr. Bradish: Just a minute. Again, I'm going

(Deposition of Mrs. Donald Carlson.)

to have to object to the reading of this deposition, or any portion of it, from that point on to the end on the same grounds that we heretofore urged before your Honor as our objections to the reading of this deposition, namely that it is completely immaterial to the issues claimed [169] by the pleadings in this lawsuit. There has been no foundation laid for the reading of this deposition.

Mr. Packard: Let the record show that defendant, Arnold L. Lewis, doing business as Studio Cosmetics joins in this objection made by Mr. Bradish on behalf of Rexall.

Mr. Lanier: If the Court please, my position on that at this time, any objections that counsel had prior to that, we have now shown that 181 was purchased February 5th from this little drug store, 1955. We have also now shown by Exhibit 34 that it was purchased June of 1955 and it is also from batch 181. The offer we are making now, from the same little drug store, is one purchased in between that time and that therefore it is also the inference that it is 181.

Mr. Packard: I object, your Honor, upon the ground there is no foundation in the deposition to bear out any of the statements of counsel as to that foundation. Further upon the other grounds which we have stated in chambers and which are on the record, are our grounds for objection. But that statement he has just made, I further object there is no foundation to show that to be a fact.

The Court: For reasons stated in conference in

(Deposition of Mrs. Donald Carlson.)

chambers and made a part of the record, I'll sustain the objection to the offer.

Mr. Lanier: All right. Now, your Honor, may the record show that at this time I renew my offer of both the depositions of Mrs. Carl Carlson and Mrs. Donald Carlson for all the purposes as heretofore made?

The Court: It may so show and show the offer denied.

Mr. Lanier: Thank you, your Honor.

At this time, the plaintiff rests. One moment, your Honor, may I withdraw that rest please and approach the bench?

The Court: You may.

(Whereupon, counsel for the respective parties and the reporter approached the bench and the following proceedings were had out of the hearing of the jury:)

Mr. Lanier: May the record show that it is agreed that the instructions may include the Mortality Table for a thirteen-year-old [171] as found in Corpus Juris Secundum?

Mr. Packard: Counsel, I won't agree to that. I will agree to the fact that if they become material, and if the Court deems it advisable to instruct on them, then the Court may take judicial notice and instruct accordingly.

The Court: Is that the rule in California?

Mr. Bradish: That's the rule in California.

Mr. Lanier: That's satisfactory with me if that's so.

The Court: All right.

(Whereupon, counsel for the respective parties and the reporter returned to their respective places and, thereafter, the following proceedings were had in open court:)

Mr. Lanier: With that in mind, your Honor, the plaintiff rests.

The Court: Ladies and gentlemen of the jury, it was suggested in chambers that if this very situation arose at this time that there would be some motions that would take [172] some time. It seems impracticable at the time to hold the jury until those motions have been completed without running up to the adjournment hour pretty close, and for that reason you may go at this time and be back at eleven o'clock tomorrow morning. That will give me time to dispose of such motions as counsel may have. You may withdraw at this time under the same injunction heretofore, not to talk about the case, or permit anyone to talk to you about it. You may pass.

(Whereupon, the hearing in the above entitled matter was adjourned until eleven o'clock a.m., April 11, 1958.) [173]

Be It Remembered, that a further hearing was had in the above entitled and numbered cause, on its merits, before the Honorable Fred L. Wham, Judge presiding, and a Jury, in the Federal Court Room, Federal Building in the City of Los Angeles, State

of California, on April 11, 1958, beginning at the hour of 10:00 o'clock a.m.

There were present, at said time and place, the appearances as heretofore noted.

Whereupon, Court convened in Chambers at 10:00 o'clock a.m., on said date and the following proceedings were had out of the hearing of the Jury:

The Court: Mr. Lanier has brought some authorities in to demonstrate [174] that I was wrong in ruling out his depositions, and I think he plans to re-offer. And if he does, I think the re-offer ought to be made before these motions are heard, as part of his main case.

Mr. Bradish: Well, may we be permitted to see the authorities?

The Court: You can be permitted to do anything you want to do.

Mr. Lanier: I can give you one of the cases on it, although they are voluminous. One is just about as much in point as any you will need. Carter vs. Yardley & Company, Ltd.. 64 NE (2nd) 693; Wigmore on Evidence, 457.

Mr. Packard: What does it say?

The Court: Both of those authorities are over there on the desk.

Mr. Packard: Well maybe, before we take the Court's time—I mean are you considering——

The Court: I just wanted to give that warning that he proposed to do that. I didn't want you to be taken by surprise later, because he is closed and he wants to reopen—— [175]

Mr. Packard: I think that it's within the Court's

discretion to permit him to reopen at this time and make any further offer if he wishes to, and I'm certainly not going to object to him reopening to make further offer and try to——

The Court: I thought you would object if he waited until after you made your motions and started on your own case, you would object later. If I know lawyers, I think I know them that well.

Mr. Lanier: May the record show at this time that I move the Court to reopen for the purpose of reoffering the Mrs. Carl Carlson and Mrs. Donald Carlson depositions, which depositions have been offered twice heretofore, and because of the fact that the jury isn't coming in until eleven o'clock, if counsel will stipulate that, we can go ahead with the motions, I am perfectly willing to do that. We will save time.

Mr. Bradish: Might I suggest, that we have no objection to your Honor granting the motion to reopen.

The Court: The motion will be granted to reopen for the purpose of [176] reoffering the depositions mentioned.

Mr. Bradish: Perhaps he can make his offer now and then we can see what your Honor intends to do with it, and if your Honor is going to deny it again, why we won't need to worry about making motions out of order. If your Honor intends to grant it, why then we can consider whether or not we want to wait and make our motions until after that testimony is read.

The Court: Yes.

Mr. Lanier: All right. Then, for the record, at this time I will again offer to read to the jury the depositions of Mrs. Don Carlson and Mrs. Carl Carlson.

Mr. Packard: To which we object upon the grounds heretofore stated at the time they were offered yesterday and, at this time the defendant, Arnold L. Lewis, doing business as Studio Cosmetics, objects upon the same grounds heretofore stated, that there has been no proper foundation laid for the use of the depositions——

The Court: I don't know what you mean by that Mr. Packard. [177]

Mr. Packard: Well, the foundation—he has not in the depositions shown the manner in which these parties applied the solution. First, he has a conclusion in there that they followed all the directions, which we have urged and which we have discussed heretofore that that's a conclusion on their part, that they have followed all these instructions; secondly, he has not laid the foundation to show that the product they used on their hair was the same product upon which plaintiff is claiming her injuries, and I——

The Court: He showed it was a pin curl.

Mr. Packard: No, he hasn't, your Honor.

Mr. Lanier: The depositions refer to pin curls, your Honor.

Mr. Packard: Well, now, I take issue with that, and I submit to the Court that it does not and, on the contrary, it shows that they bought a cold wave permanent kit and the evidence will clearly

show in this case that my client puts out at least three kits that I know of, and that those kits each contain different concentrations of chemicals; that further the evidence in this case, and the reading of the deposition shows that the plaintiff sustained an entirely different type of injury than sustained by the plaintiffs in the depositions. Now, counsel has called our attention this morning—the first time I have seen [178] the case—I won't say it's the first time I have seen the case, because I actually remember reading the Carter case about five years ago when I was going back to Boston to take some depositions. It was probably the last time I read a Massachusetts case, but I am familiar with the case. That's the one where the women put perfume upon their skin. Now, there's an altogether different situation involved when a person puts something directly in contact with their skin than when they follow a procedure of using neutralizers, and they use solutions, and they permit certain time intervals to elapse and so forth, and apparently in the Carter-Yardley case, which is a Massachusetts case—a 1946 case—it was where they used a perfume and they held that the damage was caused by some harmful ingredient. In other words, the damages could be inferred that it was caused by some harmful ingredient other than peculiar susceptibility, and I may state to the Court that Massachusetts follows the minority rule on the question of allergies, susceptibilities and systemic conditions, and it stands out alone in all forty-eight states on the theory of allergy. California follows the rule

that a manufacturer is not responsible for injuries sustained as a result of a systemic condition or an allergy or reaction to a product. And Massachusetts is the only state that I [179] know of that follows the minority rule—and maybe one or two others—where they hold that you have to call attention to allergies and so forth in your product. And a leading case has been cited in my memorandum of points and authorities, Zager vs. F. W. Woolworth, where this woman put on some cream to remove freckles from her arms and she had an allergy or reaction to it, and I can cite the Court many authorities—and that's the majority rule in the United States—that a manufacturer is not responsible. A small percentage of people will have a reaction or allergy to some type of product he puts on the market, but the law in this state is to the effect that under normal uses the average person would receive, or a large portion of people would receive, a reaction to this particular product, and I submit to the Court that this case is not authority for the use of the deposition inasmuch as the language stated there is the minority rule for one thing; secondly, they have not laid a proper foundation in this case to show that the same product was used. There is no question they had the same product here in this Carter case. In Massachusetts, they had this perfume, so that they——

Mr. Lanier: Of which they make eighty.

Mr. Packard: What? [180]

Mr. Lanier: Of which they make eighty kinds.

Mr. Packard: Of what?

Mr. Lanier: Perfume.

Mr. Packard: It doesn't say eighty kinds of perfume.

Mr. Lanier: All right, do they tie it down to a particular thing, particular type of perfume?—no they don't. It's the Yardley Company—it's the Cara Nome Company. It's not only that one case. When we're discussing evidence, you do not have any minority rule on evidence there. Take your Wigmore. It's fundamental evidence——

Mr. Packard: What's fundamental?

Mr. Lanier: I can show——

Mr. Packard: Here is the testimony, listen to this, your Honor——

The Court: Get your Wigmore and let's see the language that you rely on. [181]

Mr. Packard: Your Honor, let me just show you now what this case states right here. I just started reading the case. I just picked up the foot notes,—

"Over the exception of the defendant, the plaintiff was permitted to introduce evidence of two lay witnesses and one admittedly qualified expert physician, to the effect that each of them had applied to his or her own skin perfume from the same bottle, and that it irritated and inflammed and injured the skin."

I think that answers the problem right there, that they took and applied "from the same bottle" the exact perfume and it irritated the skin. Now there's your foundation, it was the same bottle.

The Court: Are you going to give me the language from Wigmore?

Mr. Lanier: Yes. Take, for instance, in Upton vs. Harris, a federal case — injured from broken glass in a Coca-Cola bottle. "The finding of foreign substances by other persons in other such bottles prepared by the defendant admitted." The cases, your Honor, are just voluminous. You don't have to go to that particular bottle to find out——

Mr. Packard: That's what the case you cited says, that they took it from exactly the same bottle and they applied it to their skin. [182]

Mr. Lanier: It doesn't change the principle.

Mr. Rourke: The only issue is relevancy, and it's of course more relevant if from the same bottle.

Mr. Packard: Well I'm objecting there is no foundation here, among other things.

Mr. Bradish: I might suggest that the broken glass in the Coca-Cola bottle is not the situation we have here. Here we have a chemical product which, to be properly used, must be used according to directions, and I think everybody will admit that a chemical product such as this, if not used according to directions will have some bad results, but there is no directions for the use of the bottle of Coca-Cola, so you can assume that one who drinks Coca-Cola, all they have to do is open it and drink it. My objection on the lack of foundation is that there is no foundation here as to the step-by-step directions that the deponent either followed or failed to follow.

Mr. Rourke: That's all set forth in the depositions.

Mr. Packard: There's one further thing, I think your Honor, that is the [183] fact of these two depositions, we don't know the condition of these women's hair before they had this cold wave, they may have had bleached hair, tinted hair, we don't know whether they took a test curl—and those all go to foundation——

Mr. Lanier: Counsel, how can you make that contention when you have a lawyer there cross examining on every bit of that?

Mr. Packard: We don't have to lay the foundation. If he wants to use the testimony, the burden is upon the plaintiff, or the parties offering evidence, to lay the foundation for his own evidence. He can't say you didn't cross examine and lay the foundation for us—it's ridiculous.

Mr. Lanier: Counsel, you are presuming—first of all, when a person states "I used 'X' product, I read the directions, I followed every direction in there," that is not a conclusion. That is a statement of what they, themselves, did. Now that is subject to any cross examination you want, into details of how they did it. But when we come to the point that a person can't say that "I read that sentence, I read those directions, and I followed them," if that is a conclusion, then we are going to have to revise the whole rules of evidence. [184] It's only subject to cross examination——

The Court: Mr. Lanier, I sat here and pondered over the thing. I think it's a little doubtful whether

you are entitled to have those in or not. It's your case and you are insisting very strongly, and I would hate to deprive your client of a right that would result in her receiving injustice in this court. Upon your insistence, I am going to admit those depositions. That was my original ruling and I was so doubtful about it that I excluded them, and now upon your authorities and upon your insistence I am permitting them to go in and permitting you to read them. Now, then, considering those depositions read, can we go ahead with the motions?

Mr. Packard: Certainly. I think we can proceed, assuming for the purpose of our motion and assuming for the record that plaintiff has read the depositions of both the Mrs. Carlsons, I forgot their —Don Carlson and so forth——

The Court: Two women, wasn't it?

Mr. Lanier: Two women, yes.

Mr. Packard: (Continuing) ——and stipulating that they have been read into the record and, thereafter, the plaintiffs have rested, and that at this time the defendants [185] are in a position to make any motions which may be made after——

The Court: Well, now, to avoid the possibility of future trouble, I had the Clerk bring the exhibits in, and I went over them because I never had seen them myself, and I note that stack of advertising, while it was marked for identification, it was never offered in evidence. I didn't know whether you overlooked that or not.

Mr. Lanier: Your Honor, I believe that each one

of those were offered. I believe that the record of the reporter will show that they were offered.

The Court: No, they were not. I noticed that in particularly, and the Clerk——

Mr. Lanier: And that the advertising was not offered in evidence?

The Court: Not a single piece of it except 7 and 28.

Mr. Lanier: Well, it's certainly an error on my part, your Honor. I certainly thought that I offered them, and I will request on the reopen to offer them. [186]

Mr. Bradish: I will have an objection to those.

Mr. Lanier: If they are not in, I certainly intended to offer them.

Mr. Bradish: I will object to them and I can probably urge my objection now, if your Honor would like, if you care to offer them.

Mr. Lanier: What are those numbers?

The Clerk: In evidence, or——

Mr. Lanier: I mean the advertising sheets?

The Clerk: Oh, 8 through 25.

Mr. Lanier: 8 through 25. At this time, may the record show that I offer into evidence, upon the proof now in the record, Exhibits 8 through 25.

Mr. Bradish: Well, I'm going to object to it on the ground that there's no foundation laid that the records, or the documents here sought to be offered, were ever seen or read by any of the plaintiffs in this matter prior to the purchase of the solution which gave rise to this particular cause of action. [187] These happen to be mats of Na-

tional Advertising that was conducted in the years 1953 and 1954 throughout the United States in various periodicals, but we haven't any evidence before the Court that this lady ever read any of the ads appearing in these documents prior to her purchase of this commodity. Her testimony, as I recall it, was that she thinks she saw some ads about Rexall and the Cara Nome products in the Farm Journal, but she didn't remember which year it was, '53 or '54, and also didn't remember when the Farm Journal was published and also she remembered nothing about what she read other than she saw the product Cara Nome in a list of the products that they put out, and the additional statement that she saw in the ads that Rexall stands behind their products. Well, I certainly feel that the statement "Rexall stands behind their products" is a long way short of being any express warranty——

The Court: That's on the basis of double your money back.

Mr. Bradish: Pardon?

The Court: That's on the basis of double your money back.

Mr. Bradish: That's right. The best evidence of what she read of [188] course would be the articles themselves, and we haven't had any copies of any articles that she read in any magazine prior to the purchase of this cold wave solution.

Mr. Lanier: In answer to that, your Honor——

Mr. Packard: I join in the motion, your Honor, inasmuch as I believe there has been no foundation,

likewise, for this testimony. As your Honor remembers, I think the first day I made a great amount of objections and so forth. I feel that the proper way for the plaintiff to have said "Well, I read it in such and such a magazine," and then tie in with the defendants that they published it, and they were responsible for the dissemination of that particular ad, and that particular article, but she has not tied in any particular article which she read which she relied upon. All they did is they subpoenaed all these records in as a fishing expedition and looked through them and saw where they put them out and she says "Oh, yes, I read some of those some place at one time; I don't remember what I read and where I read it, but I read it during the year '53 or '54,"—and I submit there's no proper foundation for the evidence.

Mr. Lanier: In answer to that, please the Court, first of all, without [189] anything further, the exhibits are all produced by the defendant; they are conceded to be mats and proofs of the ads that they ran in national periodicals in '53 and '54, immediately preceding the instant case. If, for no other purpose, they are admissible to show the extent of their advertising; secondly, there is no necessity to show that the plaintiff saw any particular ad in any given magazine. She doesn't have to bring "a" magazine that she saw. The mere fact that she picked it up on a bus or a train, and has no idea what it is, if she saw it and if she relied on it. They concede that they advertised in the Farm Journal during the same period of time. She takes and sub-

scribes to Farm Journal. She knows and has testified that she has read the Farm Journal. She testified to almost identically, even the wording that appears on the bottom of all of these ads. Everyone of the ads, as the ads will show, that "Rexall stands behind their products," appears on the bottom of their ad——

The Court: Do you contend that it is a Cara Nome representation?

Mr. Lanier: Yes, your Honor.

The Court: By Cara Nome?

Mr. Lanier: By Cara Nome and Rexall. [190]

The Court: What is your theory there? It's Rexall that puts out the ads, isn't it?

Mr. Lanier: And Cara Nome is their product, your Honor. It's Rexall Cara Nome.

Mr. Bradish: It's conceded directly to the contrary in the pretrial statement. The only admitted facts in the pretrial statement are that Rexall is the distributor of this product, has nothing to do with its manufacture and has nothing to do with its testing or its component parts; it buys from the manufacturer in a sealed package and sells through its distributing agencies, through these various independent drug stores. Now, if your Honor please, it has been conceded that North Dakota has established the Uniform Sales Act as we have it in California, in toto, and it's identical. In Section 1732 of our Civil Code which is part of our Unform Sales Act, under "Definition of Express Warranties," it says—

"Any affirmation of fact, or any promise by the

seller relating to the goods, is an expressed warranty if the natural tendency of such affirmation, or promise, is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon. [191] No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty." Now, her testimony is that she saw Cara Nome products listed. That's all. She doesn't know anything else that she read in relation to Cara Nome products. Now I submit to your Honor, that the mere listing of Cara Nome products, the various products that they make, in a national publication, is not an affirmation of fact or any promise by the seller. It isn't even an opinion as to the value of the goods. Now, if they are going to rely upon that statement that "Rexall stands behind their goods," I think that falls far short of the definition of a warranty, and comes within the exception which says "no affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion, shall be construed as a warranty." Now, the guarantee that she got is a mere statement as to the value of the goods, and it most certainly is expressed because they offered to refund twice the purchase price if they don't think that this product is better than any other cold wave that they have used. There's no affirmation in here——

Mr. Lanier: I wonder, your Honor, if I could get the Northeastern Advance Sheets? [192]

Mr. Packard: (Continuing) ——I may state, your Honor, that——

The Court: I think it's lying right there.

Mr. Packard: (Continuing) ——I have picked up the first one marked here and it does have down here, in a little block, along with many other Cara Nome curl permanent — it says "Available in two kits, one designed for normal hair, the other for dyed or bleached hair, general acting."

Mr. Rourke: General acting—if that isn't a statement of fact, I don't know what is.

Mr. Packard: All right. It says "general acting," but that means to be followed according to direction; but what is the warranty? The warranty says "All Rexall drug products are guaranteed to give satisfactory or your money back." It doesn't say they're safer than any other, you will not be injured by them, and so forth. And then it says, "You can depend on any drug product that bears the name of Rexall." That doesn't say anything.

Mr. Rourke: It doesn't?

Mr. Bradish: It says you can depend on it, but it certainly falls [193] short of an express warranty under the definition.

The Court: Of course, that's a matter that can be argued on, as to the meaning of them, but the question now is, are they properly tendered into evidence.

Mr. Bradish: There's no evidence, your Honor, that she saw any of these ads.

Mr. Packard: I join in the objection. Furthermore, I submit to the Court, insofar as my client

is concerned, on the warranty, he did not disseminate them, he did not pay for them, and there is no foundation whatsoever insofar as the defendant Lewis is concerned relative to the dissemination or publication——

The Court: Well, of course, Rexall is your distributor.

Mr. Lanier: The testimony also, if the Court will recall, of Arnold Lewis is that he makes Cara Nome exclusively for Rexall.

Mr. Packard: Well, but we can't be bound by what—Rexall may say this is the greatest product that's ever been on the market, but that doesn't mean we agree with all the advertisements that Rexall may put on the market, disseminate——

Mr. Lanier: May I read this language, your Honor, in Rogers v. Toni Home Permanent (147 N.E. 2d 612):

"Many of these manufactured articles are shipped out in sealed containers by the manufacturer, and the retailers who dispense them to ultimate consumers are but conduits or outlets through which the manufacturer distributes his goods. The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss."

Now, the whole point, your Honor, is that, first of all, we have the right to show the scope of their advertising, if we went no further, and what they have done and said under the name "Cara Nome" and under the name "Rexall," or either of them. It would be admissible for that purpose, if for none other. Secondly, they testified that these advertisements have been made through the Farm Journal. She is a subscriber to the Farm Journal. She stated specifically, not generally, that she has read their ads in the Farm Journal. These mats and proofs being a part of them. That she has been where they have said "gentle, safe"; that she has seen that Rexall stands behind its products. She is relying upon the quality of——

The Court: It doesn't say "it's safe," does it?

Mr. Lanier: Some of your ads were, your Honor. [195] Also I might add that the directions on the kit say "quicker, easier, safer," that was in the kit itself, and in their ads also some of them do.

Mr. Bradish: There again, we didn't put the directions on the kit at all. The manufacturer put those on. May I see that citation? You said something——

Mr. Packard: There is an interesting thing, if I may say, about this citation. You know, yesterday afternoon your Honor, just to relax a little after leaving Court, I went back to my office and on my desk was the American Bar Association Journal, so I always pick it up and read the section "What's New in the Law," so what shall I find but the case that Mr. Lanier cited here. Here it says—

"Sale, Warranties. The Supreme Court of Ohio has advanced into pioneer ground by holding that lack of privity does not prevent the ultimate consumer of a cosmetic from maintaining an action against the manufacturer for breach of an express warranty, but three judges have protested that the Court went further than necessary to dispose of the case." And it goes on to discuss the case and it tells that it was based upon deceit—they alleged a certain cause of action based upon deceit, which we don't have here. Then it says, the last paragraph says: [196]

"Three judges concurred separately, believing that the count should stand because it alleged an action based on deceit——

Mr. Lanier: That's the dissent though, counsel.

Mr. Packard: All right. (Continuing) "——but remonstrating that the majority had unnecessarily based its conclusion upon pronouncements of law which is expressly recognized as being opposed to the present weight of authorities and discarding legal concepts of the past, and as possibly conflicting with previous decisions of this Court."

Now what counsel has asked this Court to do in this case right here now is to pioneer—I mean on letting these depositions in, on these warranties, without privy, and so forth, and I don't feel that this Court should pioneer on all the rulings, and the matters before it. This is just interesting. I just picked this up yesterday as I got back to the office and started reading that.

The Court: I notice the dissenting opinion there,

Mr. Lanier, was written by Judge Taft. I wonder what Taft that is?

Mr. Lanier: I would presume he is part of the same family. I don't know either. [197]

Mr. Packard: We will argue that point at the proper stage of the proceedings. (Laughter.) Before the Court is the admissibility of these documents.

Mr. Lanier: Of course, on the point that counsel brings up, don't get me wrong, your Honor, I don't ever like to be in a position of misleading a Court, and we've got these cases to live with. There's no question of a conflict of law; however, that is one of the reasons I left the California Law Review article with the Court. There are many other good ones. The Tennessee Law Review, the last issue for instance, has an excellent coverage——

The Court: I haven't read that Law Review article.

Mr. Lanier (Continuing): ——but it is not quite like counsel says. The definite tendency right now, markedly, is to put it in the same category with food and drugs and all of your recent decisions, your very recent ones, are coming in tending and leaning that way, particularly in your good jurisdictions, and the California Law Review article very clearly points it out, not quite as simply as counsel says.

Mr. Packard: Your Honor, I just can't see why this Court should go into the pioneering field; I mean, let's look at the law. [198] There isn't a single case in the State of California—well, counsel

concede there isn't any in North Dakota, or under the Uniform Sales Act, there isn't a single case in the State of California which holds that anything other than food stuff for human consumption recognizes that the warranty goes without privy——

The Court: I'm going to be against you on that, Mr. Packard, I'll be against you on that.

Mr. Packard: Well, that's contrary to all the——

The Court: Well, it may be; it's not all the law, but I think it should be the law.

Mr. Packard: But counsel has come in here, your Honor, and he has picked up the Ohio State which the American Bar have read, and that's their opinion. You're not bound by that, but it's quite obvious, they're pioneering. Then he cites you a Massachusetts case on the point of using these depositions, and the Massachusetts law is the minority view on this particular doctrine of allergies and so forth, and the purpose for which this evidence was admitted in Massachusetts. So we're taking all the minority rules, all over the United States, and we're following all of the minority. That's what it appears to me. [199]

Mr. Lanier: That's an incorrect statement, counsel.

Mr. Packard: Let's look to North Dakota and there's no law there, then look to California and New York——

Mr. Lanier: No, you don't look to California——

The Court: I think California has to be considered. If you have similar statutes in the two states,

I think the California interpretation of the statute certainly is worthy of——

Mr. Lanier: I don't question that, your Honor——

Mr. Bradish: We have a rather leading case by our Supreme Court on the necessity of privity, which——

The Court: Well——

Mr. Packard: Let's wait, we've got too many matters going at one time here.

The Court: I have already ruled on the depositions.

Mr. Packard: He has ruled on that.

The Court: I have already ruled on that. [200]

Mr. Packard: And of course our objections have been noted in the record.

The Court: Your objections have been noted, that's right.

Mr. Lanier: The offer now has been to the ads, your Honor, to be admitted.

The Court: The only evidence that anybody read those ads in connection with this case was Mrs. Nihill's reading of the ad in the Farm Journal, if I recall correctly——

Mr. Bradish: Reading of an ad.

The Court: What?

Mr. Bradish: The reading of an ad. There's no evidence that one of these was the ad that she read.

The Court: Yes.

Mr. Rourke: Of course the quoted material is the identical material she read.

Mr. Bradish: I think that's probably very likely after she read these.

Mr. Lanier: She has never read this counsel——

Mr. Rourke: She has never seen these.

Mr. Lanier (Continuing): ——never been submitted to her nor shown to her, and they have been in the clerk's possession. At no time has she ever seen them.

Mr. Packard: She probably knows what's in them though.

Mr. Lanier: Why of course she does because she has seen them. That's what she testified to.

Mr. Packard: Somebody probably told her what the ads say, I'm sure of that.

The Court: Recriminations never got any lawyers anywhere with the court or anybody else. Just stick to your own arguments. Why, I can't conceive, Mr. Lanier, why the fact that they have advertised widely, unless it's brought to the attention of the purchaser, that would make them admissible.

Mr. Lanier: My only point there, your Honor, is that they have been brought to the attention of the purchaser. She has testified that she has read them many times and in particular one magazine, the Farm Journal,—— [202]

The Court: Well, I'll let them in. It's your case, Mr. Lanier. If you get me in trouble here, why it's your poor little gal that's going to suffer from it.

Mr. Bradish: The record, I suppose, has noted our objections.

The Court: Noted your objections. That will be protected.

(Thereupon, Plaintiff's Exhibits Nos. 8 through 25, heretofore marked for identification, were received in evidence and made a part of this record.)

Mr. Packard: There's one further thing, your Honor. You have admitted—I shouldn't say "admitted", but you intend to permit the reading of the depositions over our objections. Now, there's the problem of the certain, specific objections, other than "no foundation", and it's immaterial, irrelevant, and incompetent.

The Court: As to the form of the question calling for a conclusion, as I recall.

Mr. Packard: Yes, do you want us to make that when they take the stand.

The Court: I'm going to permit that to be read as it is. [203]

Mr. Packard: You mean you are not going to sustain any objection?

The Court: No. That's right.

Mr. Packard: Well may we—we hate to get——

The Court: I think it's perfectly all right for you to do that. I don't know any reason why you shouldn't make your record as you go along because, after all, that's the only way a case can be tried.

Mr. Packard: I thought maybe we could have a stipulation. We've objected to certain questions in Chambers here, and then we won't have to be standing up——

The Court: Well, if counsel wishes, we can make that stipulation. I don't see anything to be lost by it. You will have to stand on the validity of your questions.

Mr. Lanier: Well, now, there's only one thing, your Honor. I have no objection to that. I think I know what counsel is talking about. The only thing is, what objection they make.

The Court: Well, suppose you state your objections then in the court [204] room.

Mr. Packard: Okay, fine.

Mr. Bradish: As they are reached?

The Court: Yes, within reason; I don't know how many objections there are.

Mr. Bradish: There's dozens of them.

The Court: They are all based upon the same thing, aren't they?

Mr. Bradish: Generally speaking, it's based upon the fact that the question calls for a conclusion and opinion of the witness.

Mr. Lanier: Well, now, counsel, if it will help any, so far as conclusion and opinion is concerned, I am certainly willing to stipulate you've got that same objection to all the questions.

Mr. Packard: Well, I'll accept that stipulation that opinion and conclusion objections interposed by my client, Lewis—and I've already noted my objections to the reading of the depositions, to the foundation, that it's immaterial, irrelevant and incompetent, and then if there is any [205] further objections other than objections that it calls for a

conclusion or an opinion, I will note them in the court room.

Mr. Bradish: I'll join in that with the understanding that by not objecting to each particular question on the ground that it calls for a conclusion and opinion, that we haven't waived our right to have the court consider that that objection is made to those questions which we feel do call for the opinion.

Mr. Lanier: It is so stipulated.

Mr. Bradish: And do I understand that, as to any objection which will be made to calling for the conclusion, or opinion, of the witness, that your Honor is overruling that?

The Court: Overruling the objection. Is that satisfactory with you, Mr. Lanier?

Mr. Lanier: So stipulated, your Honor.

The Court: Now, let's get down to the merits of this thing.

Mr. Packard: We have the stipulations already in, that, for the purpose [206] of this Motion, it has been stipulated to that the depositions have been read over the objections noted; that the plaintiffs have rested their case, and at this time, the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, moves the Court for a dismissal as to the first cause of action upon the basis that the plaintiff has failed to state a prima facie case as against said defendant; that, taking all the evidence in the light most favorable to the plaintiff, and drawing all the reasonable inferences in the light most favorable to the plaintiff, they

have failed to show that there was any negligence on the part of the defendant, Arnold Lewis, in the compounding, mixing or distributing of this particular—or labeling—of this particular product. There's not one iota of evidence in this record showing that the chemical composition, or the mixture of the component parts of this product, did not conform to the normal, accepted, standard, cold wave solution that's distributed throughout this country; that counsel has apparently attempted to put on evidence here to show that this girl had a permanent wave, using this type of solution, on February 5, 1955, and that, thereafter, she saw a doctor on the 28th—her hair was falling out and it continued to fall out and progressed until she got in the position she is at the present time, or lost all her hair practically. I submit to the Court that the evidence of [207] the plaintiff shows that they had a bottle with the same code on it, they could have analyzed it, they could have come in and had some testimony, and the proper way to prove a case of this nature—I believe you have read the case of Briggs vs. National Industry, and so forth, to show what the chemical composition was, and it was in such concentration that it was a direct irritant to some particular portion of the body, or it was in such concentration that it would cause this particular end result. I submit to the Court that there is no such evidence in this case. The only evidence in here is evidence of the fact that chemicals contained in hair wave solutions can be irritants. Now that means that every single manufac-

turer of a cold wave solution in this country is liable for, if the Court permits this to go to the jury on that issue, is liable for any untoward results. Anybody suffers by reason of any cold wave solution if the Court believes that just because there is a chemical composition in this cold wave which is in every cold wave which is an irritant, that if someone has an untoward result, that the manufacturer is responsible, and that certainly is not the law, and to permit this matter to go to the jury on the issue of negligence I feel is not proper, and I feel that there is no evidence whatsoever in this case which would sustain a verdict, in the event a verdict was rendered, [208] on the issue of negligence, and the Court at this time should dismiss the count based upon negligence on a failure on the part of the plaintiff to establish a prima facie case, and that cause of action should be dismissed.

Mr. Bradish: Do you want to hear from me, your Honor?

The Court: On the first count.

Mr. Bradish: Yes. Well, I will join with the defendant Lewis, and, on behalf of the defendant Rexall Drug Company, will make a Motion to Dismiss and, to save time, I will incorporate all of the arguments and the points urged by counsel for defendent Lewis in my Motion, and then I would like to add to that the fact that it has been admitted by all the parties in this case, that defendant Rexall Drug Company did not—I think I better read it exactly so that I won't be accused of misconstruing the admission—in the Pretrial Confer-

ence Order, under Paragraph 3—Admitted facts are as follows:

1. The plaintiff is a minor, suing through her general guardian, her father, John Nihill.

2. The defendant Rexall Drug Company, a corporation, is a Delaware corporation, authorized to do business in the State of California.

3. The defendant Arnold L. Lewis is an individual doing [209] business under the fictitious firm name and style of Studio Cosmetics Company, and a resident of California.

4. The defendant Arnold L. Lewis is the manufacturer of a product known and sold as Cara Nome Natural Curl Brand Pin Curl Permanent.

5. The defendant, Rexall Drug Company, is the national distributor of said product under purchase order introduced as Exhibit blank. Said Defendant Rexall Drug Company did not participate in the preparation or manufacture of the product, but purchased and sold said product in sealed containers as received from the defendant, Arnold L. Lewis, doing business as "Studio Cosmetics Company". Then there's two other paragraphs that are not material, and then this language:

"These admissions of fact were true at all times material herein."

Paragraph IV:

"There are no reservations as to the facts stated in paragraph III".

Now, your Honor, in order for the plaintiff to recover from the defendant, Rexall Drug Company,

on account of negligence, they must do one of two things. They either must offer evidence that we were negligent in the preparation and compounding of the substance used, or they must offer evidence to prove that there was a duty incumbent upon [210] Rexall Drug Company to make tests and inspections of the solution in the cold wave. I think, by their own admission just read, they can't possibly urge—or offer—any evidence of any negligence on the part of defendant Rexall Drug Company, in the manufacture and preparation, because they have admitted that we had nothing to do with it. Insofar as the other possiblity, that of a duty to inspect, there has been no evidence offered that there is any duty incumbent upon this defendant, as a distributor, to inspect any of the products that they distribute at all. That duty, if it did exist, could be offered either by way of statute—statutory requirements—requiring a distributor to make such tests, or case law, which held that it was the duty of a distributor to test each of the products which they distributed, and I submit to the Court that the law in our Sate is directly contrary to that particular contention that there is any duty on the distributor to inspect or make tests of any products that they distribute. That duty rests solely upon the manufacturer. So, insofar as defendant, Rexall Drug Company, is concerned, with what I adopted of Mr. Packard's argument, plus what I have just read to the Court, and indicated to the Court as further grounds for Rexall Drug Company's motion to dismiss the first

county, I urge the motion on that in behalf of that defendant, reserving of [211] course the right to move as to the second count.

The Court: Now, Mr. Lanier, you might reply to their arguments as to the first count.

Mr. Lanier: May the record show that the motion is resisted, your Honor.

The Court: No special reply?

Mr. Lanier: I have no special argument.

The Court: Well I'd like to hear from you on Mr.——

Mr. Lanier: Well, then, if the Court would, I'd be glad to. First of all, may I——

The Court: Where is the negligence on the part of the drug company?

Mr. Lanier: The drug company, your Honor, as the manufacturer who he has to supply him, exclusively, as the record shows, with this product, for sale under his name, not just a product that he's getting—"X" product—but it's made up "Rexall Cara Nome", under his name. Then he distributes [212] to his retailer the product, and as such he is liable for the product that has his name on it, the Rexall Company stands behind it. Your ads which are in evidence state the "Rexall Company stands behind" this product——

The Court: Well, now, that doesn't quite reach the point of negligence.

Mr. Lanier: Now then, again we come back to where we are arguing weight, your Honor. If there has been no negligence shown, and if, for instance, res ipsa doesn't apply, which it does under

the North Dakota law, which is one of the things—counsel argues the Briggs case in California—the Briggs case has nothing to do with this lawsuit. Burt vs. Lake Region Flying Service, is the North Dakota law——

The Court: You look on this case as being against, in a fashion, a single entity, consisting of the manufacturer and Rexall as being liable for anything to which liability can attach regardless of the separateness of their——

Mr. Lanier: That is correct, your Honor. Now, for instance, let's take the retailer himself, take the local druggist. The local druggist himself gets the packaged goods, Rexall Cara Nome. Now he, himself, makes no guarantee that he [213] stands behind this particular product, it comes to him sealed; but Rexall, under the proof in the record, orders this shipped from the manufacturer to the retailer with the name Rexall on it. It is manufactured for Rexall and it is "Rexall Cara Nome", not just "Cara Nome". It's "Rexall Cara Nome", and they, themselves, stand behind the Rexall products, and the two of them stand in exactly the same light.

Mr. Packard: Before your Honor rules, I'd like to be heard a little further. In other words, when I argued my Motion, I was arguing on negligence, and counsel is indicating he feels res ipsa loquitur applies, and I don't want to—the Court could feel that I haven't any answer for that except——

The Court: You don't want me to think you concede that?

Mr. Packard: No. That is a point, and I thought, if counsel were going to argue res ipsa, then I wanted to answer to that, and, apparently, he said there was no argument, and he wanted the Court to go ahead and rule, but I want the Court to have the benefit of my thoughts on whether the doctrine of res ipsa loquitur applies or not. I was arguing that—— [214]

The Court: I'm not compelled to rule on that at this time, am I?

Mr. Lanier: I wouldn't think so, your Honor, except when he says there's no proof of negligence. Counsel is now moving on the first count which is the negligence. Certainly the question of res ipsa enters into it.

The Court: It might well with reference to Mr. Packard's client, but I can't quite see it on the Rexall, Mr. Lanier.

Mr. Bradish: I ask the Court to look at this exhibit, and I submit to the Court that nowhere on this package will you find the word "Rexall". This is Cara Nome Natural Pin Curl Permanent. Rexall's name is not displayed anywhere.

Mr. Lanier: You have a Rexall guarantee within the package, your Honor.

Mr. Bradish: You are not proceeding on the guarantee and, besides, all of this argument about Rexall's name or guarantee goes to the cause of action in warranty, it doesn't go to the cause of action in negligence.

The Court: We are talking about negligence now, Mr. Lanier. [215]

Mr. Lanier: Yes. My point is that Rexall and the Cara Nome and the defendant Studio Cosmetics, so far as this lawsuit is concerned, and the negligence in the making of this product, or any harmful or deterent results that it would have, are one and the same, so far as their liability is concerned. As a matter of fact, I think it's their very name, is it not?

Mr. Bradish: It's a trademark name.

Mr. Rourke: Trademark by Rexall.

Mr. Bradish: That's true, but how does the fact that you trademark a name and a manufacturer manufactures for you a product under that trade name, how does that attach any negligence whatsoever on the part of the distributor?

Mr. Rourke: Because you can't just delegate all of your duties of inspection to somebody else.

Mr. Bradish: Have you got any cases that hold that?

Mr. Rourke: Why certainly.

Mr. Bradish: I'd sure like to—— [216]

Mr. Packard: I don't know whether the Court is familiar with what we are talking about—negligence and warranty—it seems to me we are getting ourselves a little confused here. I was intending to take one subject at a time.

The Court: That's what we are trying to do, Mr. Packard.

Mr. Packard: Now, have you finished——

Mr. Lanier: I have finished only if I have an-

swered what the Court is inquiring about. So far as the manufacturer here is concerned, Studio Cosmetics, and Rexall Drug is concerned, if there is any harmful effects, any negligent acts, which causes harm, they are one and the same. Under the testimony that is in, Studio Cosmetics exclusively makes this product for Rexall. Rexall exclusively merchandises it, and from the manufacturer. Is that right? They have the duty and are just as responsible as the manufacturer, when that product is shipped to a retailer, of inspection, and to see to it that it has the proper chemicals and it does not have any harmful ingredients.

Mr. Packard: That's if they put their name on that box——

Mr. Lanier: You put the guarantee of Rexall within the container. You [217] connect your name with Cara Nome. You have the duty of inspection.

Mr. Packard: I think the evidence is that the local druggist did.

The Court: Well the Motion will be denied as to the first count. That is for the present, but I'll hear you again at the conclusion of the case.

Mr. Packard: Well I haven't argued res ipsa, and——

The Court: Well, that isn't involved necessarily. That will come on later.

Mr. Packard: Well I anticipated—I have the cases, maybe I could just briefly, just in a few minutes, point out my thinking for the benefit of the Court.

The Court: Go ahead. I might need that, as I think about it.

Mr. Packard: One of our leading older California Supreme Court cases, is Olson vs. Whittorne, 203 Cal. 206——

The Court: That means the Supreme Court, or——

Mr. Packard: That's our highest appellate court.

The Court: What is the page?

Mr. Packard: It's at page 206. I'll just read this. This is just going to take me a second, your Honor, if you will bear with me:

"The plaintiff contends in the trial and now contends that the doctrine of res ipsa loquitur should apply to the situation presented on her behalf——

Mr. Lanier: Excuse me, counsel, what's the name of the case?

Mr. Packard: Olson vs. Whittorne & Swan.

Mr. Lanier: All right.

Mr. Packard (Continuing): "We think this is a case in which the doctrine is not applicable. To render the doctrine applicable, it must be shown that the instrumentality causing the injury was under the control of the defendant and that the injury was caused by some act incident to the control, and the injury must be of such a nature that it ordinarily would not have occurred but for the defendant's negligence." Now, that, I think, meets the three requirements, your Honor, which I will discuss more at length [219] later on, but all over the country those are the three requirements in

order for the doctrine, but here is what the Court further goes on to say:

"It does not apply where an unexplained accident might have been caused by plaintiff's negligence". Now the testimony of the medical experts said that it might have been caused by this cold wave solution. But the Court says "It does not apply where an unexplained accident might have been caused by plaintiff's negligence, or been due to one of several causes for some of which defendant is not responsible". And that's what we are claiming here, that the medical testimony thoroughly has been here that it might have been caused by this, but this is unexplained, it may be caused by various factors as alopecia areata, and so her condition might have been caused by other conditions other than the negligence, and I'll go back and argue the cases when they start talking about weighing the probabilities of negligence. I think that's the test in California, and that's the test in res ipsa, is to weighing the probabilities, and the probability has to preponderate in an inference that it must have been the negligence of defendant, and certainly the probabilities do not preponderate in this case in showing that the accident must have been brought about by negligence of the defendant or this condition would not have resulted, because I think the [220] probabilities in this case tend to go the other way, to show that she had an unfortunate situation —a systemic condition—something caused her hair to fall out, but it could have been certainly something other than the application because all the

evidence in the case—there is no direct sensitivity or irritation to the scalp. It was placed on the hair, the hair itself does not have any life or nerves, but it comes from down within the body, and if her sole injury was just the breaking off of her hair and it grew out naturally, that may be a little different situation; but that's not the situation here. Her hair fell out from a systemic condition within her, and I think the probabilities favor more that it was due to some systemic condition, or something not within the control of the defendant. I'm citing Seneris vs. Hall which happens to be one of the leading cases in this State, in which I happened to take the depositions—my firm handled it—a California case. 45 Cal. (2) 811, 824. And this is a malpractice case where they injected a spinal anathetic into the plaintiff and her legs became paralyzed, and a non-suit was granted and it was reversed, but reversed on grounds holding that explanation was more within the knowledge of the defendant and so forth, but it does discuss this law, and I think it's one of the leading cases, and it cites our Coca Cola cases—that is, [221] within that case you will find these other cases are leading cases, and it goes on. I'll read part of it:

"The application—this is at 824—the application of the doctrine of res ipsa loquitur depends on whether it can be said, in the light of common experience, that the accident was more likely than not the result of their—defendants' negligence". "More likely * * * the result". "Where no such balance of probabilities in favor of negligence can

be found, res ipsa loquitur does not apply". Now I'm only arguing the probabilities, I'm not arguing the control of instrumentalities——

The Court: Suppose we pass on from——

Mr. Packard: I'd like to give the Court one further case. 141 Cal. Ap. (2nd), 857—and incidentally, this case is a case which I personally tried, lost it for $57,000, got a judgment notwithstanding the verdict. It was upheld in the District Court and it went on up and the Supreme Court denied a hearing, meaning that the Supreme Court had passed upon it and said that the opinion was okay, but I would like to read just this one part of the case; the question was if the doctrine of res ipsa applied. My motion for a judgment notwithstanding was granted on the basis that there was no showing of proximate cause between any negligence and the injured. And the Court [222] goes on and points out:

"That defendants' negligence could possibly have been the cause, is not sufficient. The proof must be sufficient to raise a reasonable inference that the negligence complained of was the proximate cause of the injury. If that is not the result of the evidence, if the fact finder is left in doubt and uncertainty, he cannot base a verdict or finding on guess or conjecture", and that was the point I was raising yesterday on the proximate cause. The evidence here is that—your only evidence—"well, it might have been or could have been caused by this; but, yes, there's other factors that cause alopecia areata and can cause this condition." I could

argue further about it. I know the Court would like maybe to——

Mr. Bradish: The language is very strong in support of our contention that res ipsa doesn't apply in the case cited by counsel for the plaintiff.

The Court: Which case is that?

Mr. Bradish: Bish vs. Employers Liability Insurance Corporation, 236 Fed. (2d), 62.

Mr. Lanier: We're in agreement then, your Honor, we both can rely on [223] that.

Mr. Bradish: This is a Toni case where the verdict was for the defendant.

The Court: What's the page of that case?

Mr. Bradish: It starts on page 62, and over on 67—one of the contentions was that the Court erred in giving res ipsa in the form submitted by the plaintiff—and this court says:

"Only when the cause is established and the manufacturer is identified with it may res ipsa loquitur be called upon to supply——

The Court: Well, isn't that a question for the jury, whether——

Mr. Bradish: "Cause"? No, because it goes on, your Honor, and——

Mr. Lanier: Counsel, are you contending that proximate cause isn't a question for the jury?

Mr. Bradish: No, I'm not contending that, but I'm contending that where the proof is so lacking—and they say so right in this case—they say "* * * the mere possibility that defendant's act could have caused the damage does not warrant the application of the doctrine, and the same is true where it

is a matter of surmise or conjecture only that the damage was due to a cause for which the [224] defendant is liable". Now, in our case, the only evidence we have is from Dr. Levitt and he said that the cold wave could have caused her to lose her hair, but that certainly is a long way short of establishing the cause. That's a possibility.

Mr. Packard: That's correct, and he also testified there are other causes and some of them are unknown, and there's a controversy in the medical profession as to what these causes are.

The Court: Now, do you want to argue with reference to the second count?

The Clerk: The jury is ready.

The Court: Well, I'll hear the rest of this.

Mr. Packard: I'd like to, first of all, my argument to show that we move to Dismiss the entire Complaint, each of the causes of action, on the basis that there is no showing of proximate cause. I cited the cases. And we move now on behalf of——

Mr. Lanier: Excuse me, counsel. That last motion is resisted.

Mr. Packard (Continuing): Then the next Motion, on behalf of the defendant, Arnold Lewis, is to dismiss the second cause of action upon the basis that there has not been any [225] evidence in this case which will support a finding, or which a prima facie case has been established against the defendant Lewis for breach of any warranty, either express or implied, and that action should be dismissed as to—I say "that", I refer to the second

cause of action as against the defendant Arnold Lewis. You know, when I read this Free vs. Sluss —I had it in my authorities here——

The Court: What case is that?

Mr. Packard: That's where they had—the manufacturer printed a guarantee, the guarantee was to refund the whole purchase price upon a return of the unused portion and that, your Honor, was one of our Municipal Court cases, and that was a lower court case——

The Court: How do you cite that case?

Mr. Packard: Well, it's 87 Cal. Ap. (2) 933, but I wanted to point out to the Court—I don't want to belabor the point, but I want to point out the various courts and how they come about, knowing you are from Illinois—and in this particular case which arose in our Municipal Court, which is lower than—well it's our jurisdiction up to three thousand, and above the Municipal [226] Courts are Superior Courts with unlimited jurisdiction, and this arose in the Municipal Court. Then, in order to take an appeal from the Municipal Court, you take it to the appellate department of our Superior Court and then you're through there—see? So, his is an inferior case. When I say that—and actually this opinion is not controlling insofar as it is not an opinion of our District Court of Appeals or our Supreme Court, but it's reported in our Appellate Court Reports, but it's the decision of our Superior Court, appellate department, and in our Superior Court, right across the street here, we have three judges—they call them "justices" of the

appellate department of the Superior Courts, to hear appeals from our Municipal Court, and you are through there. And that's how this case arose. But there is no personal injury and I don't know whether you're read it or not, but the Court went on and—this is a case where soap was sent out to a dealer and it——

The Court: I don't think I read it.

Mr. Packard (Continuing): ——and it says the manufacturer and distributor—a grocery man, like Rexall in North Dakota—purchased, say, from Rexall and from Lewis, a product, and then it says "your money back, to be refunded if you return the unused [227] portion", so they sent this soap out and they tested it. His wife had a washing machine there and they sold twenty-five cases, and so they ordered another hundred cases and when it came out, it was terrible and they admitted it and the evidence was clear—it was during the War and they couldn't get these ingredients in it, and it wasn't satisfactory, so they demanded their money back, the grocery store as against the distributor and the manufacturer. It would be like if the druggist—Olig in North Dakota—said to Rexall and to Lewis, "I want my money back for this Cara Nome; I have this guarantee here that's in evidence, and we are supposed to get our money back", and they wouldn't refund it. And they went off on the question that they were really purchasing by a sample. The first twenty-five were satisfactory and good, and they ordered again and it didn't meet up and they admitted that they hadn't

put certain ingredients in and so forth. So I don't feel that that case is controlling at all in this situation here. The second shipment of soap to this grocery store wasn't the same as the first and they had this guarantee which said the money was to be refunded if it wasn't satisfactory.

The Court: Who is contending it's controlling?

Mr. Lanier: I cite it an an authority, your Honor. I don't necessarily say it's controlling. I think it's very excellent authority, it's the second highest court in the State——

Mr. Packard: The second highest? It's our lowest. It isn't even authority,——

Mr. Lanier: The opinion is written by the appellate division of the second highest court in the State.

Mr. Packard: No, it is not, counsel. I wish to differ with you.

The Court: Don't get off on a side issue now——

Mr. Packard: It is from our trial court, sitting as an Appellate Court to take the inferior courts' appeals and decide them, but they just happened to put them in those books.

Mr. Lanier: It could be a misunderstanding on my part.

Mr. Packard: Yes, it is. The Superior Courts are our trial courts, so it's from the appellate department of our trial court which hears appeals from an inferior court—— [229]

Mr. Lanier: I think I follow you.

The Court: All right. Now then we are on the question of the second count.

Mr. Bradish: Yes. Are you through?

The Court: Yes, are you through?

Mr. Packard: Well, I contend that there is no privity—that was one thing—between the ultimate consumer and the manufacturer; that this doesn't come within any of the exceptions; that California law has only gone so far as to say that lack of privity only runs as to food stuff for human consumption; that, further, as far as any warranties they are claiming, we might say the Briggs case went off and discussed the fact that——

The Court: What did it involve?

Mr. Packard: It was a cold wave, exactly the same; they had testimony on the percentage of thioglycolate. I don't believe you've read that——

The Court: Yes, I read it at the time, that was several days ago—— [230]

Mr. Packard: It's 92 Cal. Ap. (2nd) 542.

The Court: Is that in the inferior court too?

Mr. Packard: No, that's the District Court of Appeals.

The Court: What page?

Mr. Packard: 542. That actually is the leading case on this particular type of case, and in that case they went on to say that the preparation was intended for application to the hair rather than to the skin, and that's one where she had a reaction, and that was given in a beauty shop, and they sued the shop and the manufacturer, and they had expert testimony as to the content of the thioglycolate acid. And also there's Section 1735 of our Civil Code, subsection IV, in reference to warranties. It says "In a case of a contract to sell, or sale of a specified arti-

cle, under its patent or other tradename, there is no implied warranty as to its fitness for any particular purpose," and that's under the Uniform Sales—in other words, if you buy it under its tradename, there's no implied warranty for the fitness for the particular purpose—no implied [231] warranty as to its fitness for any particular purpose.

The Court: How do you get away from that, Mr. Lanier?

Mr. Lanier: Well, first of all, your Honor, I want to point out one or two things about the Briggs case, to the Court. First of all, as far as the Briggs case is concerned, plaintiff's own doctor testified positively to an allergy, that it was caused by an allergy. That's one of the big distinctions in the Briggs case. Their own doctor testified that she did have an allergy. We all concede an allergy is a defense. That's No. 1. Secondly, there was a stipulated 6.2 ammonium thioglycolate content, and her own doctor testified that it would have to go over 7 before it would be harmful. That's two things. Now, when we come back to the question of breach of warranty and the necessity for privity, that has been the California holding. In that relation, however, I would like to call the Court's attention to Tingey vs. Houghton. That's 30 Cal. (2), Supreme Court, page 97. That is going to the question of whether or not there is proof necessary. I would like to cite for the court also 209 Fed. (2nd) 130; 235 Fed. (2d) 897; 236 Fed. (2d) 69. Now my first point is this. This case is, of course, under North Dakota law. North Dakota has no [232] case on

privity of contract between the manufacturer and an ultimate buyer. Hence, the California Federal Court is free. There are no privity cases of this type in the Ninth Federal Circuit. California is only one jurisdiction. In other words, my point—to begin with, this Briggs case is not controlling at all upon the Court. It is a case to be considered, of course, by this Court; but this Court is interpreting not California law, this Court is interpreting North Dakota law, and North Dakota has no pronouncement on it. The Briggs case stands in no better light than the Toni case in Louisiana—no, the Toni case in Ohio, which is the most recent pronouncement in the United States on it, nor the Yardley case in Massachusetts, nor those cases which hold that the advertising is a warranty to the general public and, that, of course, is my entire position. I do not dispute with the Briggs case insofar as the Briggs holding is concerned, and it holds privity of contract necessary, and in this case there is no privity of contract; but, of course, that isn't at all binding on this Court. We are not in State Court, which I think is one of the things which counsel has presumed all the way through this lawsuit. [233]

The Court: Back to my original question, what about this statute that somebody mentioned over here?

Mr. Packard: 1735 (4), that there is no implied warranty——

Mr. Bradish: I think counsel is not distinguishing between express and implied. I think both of them should be——

The Court: There is a sales law in this State.

Mr. Bradish: Which is North Dakota law.

The Court: That's right. Now, then, this other——

Mr. Lanier: It is the same.

Mr. Packard: 1735, sub-section (4) provides that when you buy by a tradename or a trademark and there is no implied warranty, that it's suitable or fit for any particular purpose,——

Mr. Lanier: Of course that is the Briggs case.

Mr. Bradish: That's the law, that's the Uniform Sales Act. [234]

The Court: Is that in North Dakota also?

Mr. Packard: Yes.

Mr. Lanier: Yes. It's uniform, and that is North Dakota law except we've had no interpretation on the law, insofar as the implied warranty is concerned. Of course, the Briggs case definitely holds that there is no implied warranty and I have no particular dispute with it. Our grounds insofar as the law of the country is concerned on implied warranty, your Honor, is in the minority. Implied warranty for——

The Court: Well, I'm bound by statute. What's the effect of that statute?

Mr. Lanier: Well, as most cases in the country have interpreted it, your Honor, there is no implied warranty. I'm not resisting implied warranty very strenuously. I do in the record; I want to protect my record on it, but so far as breach of implied warranty is concerned, the cases are against us.

Mr. Bradish: Well, perhaps I better make my

little pitch. I'm going [235] to make my Motion on behalf of Rexall——

The Court: You gentlemen realize that I'm trying to get a little education here as I go along.

Mr. Packard: I think we all are, your Honor.

Mr. Bradish (Continuing): ——As to the second count and on behalf of Rexall, I would make my Motion to Dismiss in two parts based upon two grounds. The count sounds in warranty and in the initial Amended Complaint sounds in implied warranty; however, by permission of this Court, prior to the taking of any evidence, counsel was permitted to amend the pretrial order to include issues which were referable to express warranty. Insofar as the implied warranty is concerned, I think the Motion should be granted on the grounds that it comes squarely within the Uniform Sales Act which has been admitted to be the law of North Dakota and the law of California, and when you consider the evidence that this lady went to the drug-store for the sole purpose of buying a Cara Nome wave set, she was most certainly buying it by a tradename. I don't think that there is any question but what there can be no implied warranty in this case. Now, that leads us to the second possibility of a cause of action under Count two and that is [236] for express warranty and in support of my Motion for that, I would like to urge that under our law, in California, our cases which have interpreted the Uniform Sales Act, which is the law of North Dakota—the Uniform Sales Act is the law of North Dakota—our cases which have interpreted the stat-

utory law of California and, of necessity, the same statutory law of North Dakota, hold that there has to be privity of contract before an express warranty will attach. Now, counsel has admitted that there are no cases interpreting, or giving us any lead as to North Dakota's interpretation of the Uniform Sales Act, and he has attempted to cite cases throughout the country in other jurisdictions which we do not know follow, or have adopted, the Uniform Sales Act. So, since this Court is free to accept the law of another jurisdiction, if the substantive law of the State that you are bound to follow has no expression in the matter, it would seem to me most logical that this Court should follow the interpretation of the Uniform Sales Act by the California Courts, since this case is being heard in the Federal Court sitting in California, and since the North Dakota Courts have not interpreted the same Uniform Sales Act. So, I feel that the Court should, in determining this Motion, rely [237] upon the case law in California, namely, to the effect that there must be privity of contract before an express warranty will attach. Secondly, I don't think there has been any evidence of any express warranty made by the Rexall Drug Company to any party to this action or, if your Honor please, to anybody who has testified in this action. The only evidence of any possible nature upon which plaintiff can rely is the so-called guarantee which bears "Plaintiff's Exhibit No. 7," in which, on one side of the guarantee there is the language that if you don't agree that this product is as good or better than any other natural

cold wave, that you have used, we will refund double the purchase price, and under our statute, again the Uniform Sales Act, which is admittedly the law of North Dakota, an express warranty is spelled out and defined, and I believe that there is no evidence to attach any express warranty from this defendant simply by virtue of the guarantee, so-called, which has been offered into evidence. Then, we are left with one other consideration. Did the plaintiff's or the mother of the plaintiff's claim, that she saw Cara Nome products advertised in the National Farm Magazine constitute an express warranty within the meaning of our statute, the Uniform Sales Act, to the [238] mother and, I suppose vicariously, to the injured minor? The only testimony offered in that regard was that the mother saw Cara Nome advertised and saw a list of Cara Nome products. Nothing else, your Honor, insofar as Cara Nome is concerned, did she remember reading. The only other thing she said was that she read in the ad that Rexall stood behind their products. This is not, insofar as this evidence is concerned, a Rexall product—it is a Cara Nome product. The word "Rexall" does not appear on the package in any respect. So, I don't believe there has been any express warranty by virtue of the fact that this lady read an advertisement in the farm magazine, which listed Cara Nome products and which made a statement that Rexall stands behind their products. Even assuming that you could say that that assertion in the ad that Rexall stands behind its products would attach to Cara Nome—even assuming that, and certainly not

admitting it, I fail to see how a statement that Rexall stands behind their products would be an express warranty to anybody. So, I feel that insofar as implied warranty is concerned, counsel is out on their own log. Insofar as express warranty is concerned, I don't think there has been any express warranty made by this defendant to either the plaintiff to this action, or to her mother, who does not happen to be a party to the action, and, further, [239] I think that under the interpretation of the Sales Act by our California Courts, there is a failure in the second count as to this defendant, because there has not been a showing of any privity of contract between this defendant and the ultimate consumer based upon our State's courts' interpretation of the Uniform Sales Act, which is also the law of the State of North Dakota. By that I mean the Uniform Sales Act is the law of North Dakota, and we have the same law. Our Courts have interpreted it. North Dakota courts haven't. So I think your Honor would be perfectly within your rights, and it would be proper for you to consider our Court's interpretation of the same statute that exists in North Dakota as North Dakota hasn't interpreted it.

Mr. Packard: I would like for the record, your Honor, to show that I join—I have already made my motion—but I join upon the same grounds also argued by Mr. Bradish, and I point out to the Court that under our Code, Section 1735 (4), there is no implied warranty and so the only thing to consider is the express warranty and, certainly, Mr. Lewis, my client, did not disseminate any of this literature.

I mean if they are relying upon reading this Rexall apparently published in certain magazines, and certainly he wouldn't be bound by any warranties placed on t.v. or [240] magazines or anything——

The Court: (Addressing the Clerk) Will you tell the bailiff to have the jury brought in?

Mr. Lanier: May the record show that that Motion is resisted.

The Court: The Motion to Dismiss Count 2 at this time is overruled.

The Clerk: I didn't get your ruling.

The Court: The Motion on behalf of each party is denied.

Mr. Bradish: Your Honor, I think we might save a little time. I have here the original of the franchise agreement between Rexall and the Olig Drug Store which is where this product was purchased, and I have a photostat which counsel has said I may use, but he apparently is going to object to the materiality of this document in evidence, and so if I could leave it with your Honor, perhaps during the noon hour your Honor could read it and——

The Court: What's the idea? [241]

Mr. Bradish: Well, it merely shows that the drug-store is Mr. Olig's drug-store, and is not the Rexall Drug Store, as contended by counsel. They merely have a franchise agreement with Mr. Olig, whereby he can purchase Rexall products through Rexall's distributorship to sell them.

Mr. Lanier: Without getting into that now, your Honor, my point will be that it's immaterial.

The Court: I'll take a look at it.

Mr. Bradish: I also have an appointment at noon with a witness, so if your Honor could let us recess at twelve o'clock.

(Whereupon, the Court, counsel for the respective parties, the reporter and the Clerk proceeded to the Court-room, where the following proceedings were had in open Court:)

Mr. Lanier: May it please the Court, the Motion of the Plaintiff to re-open, having been allowed, and the Motion to read these depositions having now been reconsidered and allowed, I would like at this time to recall Mrs. [242] Carlson back to the stand again.

The Court: Very well.

Whereupon, the

DEPOSITION OF MRS. DONALD CARLSON

witness for the plaintiff, was read, Mr. Lanier reading the questions and Mr. Rourke reading the answers, before the Court and Jury, as follows:

"Direct Examination

"Q. (By Mr. Lanier): Would you state your full name, please? A. Mrs. Donald Carlson.

Q. Where do you live, Mrs. Carlson?

A. Spiritwood, North Dakota.

Q. Spiritwood, North Dakota, being in what county? A. Stutsman, isn't it?

Q. And in what county is Kensal, North Dakota?

A. Stutsman.

Q. Calling your attention to sometime in March

(Deposition of Mrs. Donald Carlson.)

of 1955, did you have any occasion to be in the Rexall Drug Store in Kensal, North Dakota?

A. Yes.

Q. And for what purpose did you go into the drug store?

A. Well, among many things I bought the Cara Nome permanent there.

Q. And did you make a purchase at the Kensal Rexall [243] Drug Store of a Cara Nome Home Permanent Wave set? A. Yes, sir.

Q. And who was with you at that time?

A. My mother-in-law, Mrs. Carl Carlson.

Q. And where does she live?

A. At Kensal.

Q. And did she also make the same purchase?

A. Yes, she did.

Q. So that when you came out you had two kits?

A. Yes.

Q. Of Cara Nome Rexall permanent wave?

A. Yes, sir.

Q. Now, did you take those kits home with you?

A. Yes.

Q. Did you and your mother-in-law, Mrs. Carl Carlson, apply the permanent wave solution?

A. Yes.

Q. For the purpose of giving yourselves a home permanent wave? A. Yes.

Q. Did you give the permanent wave to your mother-in-law? A. Yes.

Q. And who gave the permanent wave to you?

A. Myself. [244]

(Deposition of Mrs. Donald Carlson.)

Q. You gave her the permanent wave, and you gave yourself the permanent wave? A. Yes.

Q. And had you or not before this ever used Rexall Cara Nome Home Permanent Wave?

A. No.

Q. Before this time had you used other home waves? A. Yes, many.

Q. Your answer was many times?

A. Yes, quite a few.

Q. And will you tell me whether or not you read the directions enclosed with the Rexall Cara Nome kit? A. Yes.

Q. All right. Now, will you tell me whether or not you followed those directions? A. Yes.

Q. Did you follow the directions meticulously and carefully? A. Yes.

Q. Now, thereafter, will you tell me the result of that permanent wave to your hair?

A. The hair was strawy and dry, and the ends were funny-colored, more or less, they were lighter on the ends than they were at the scalp of the head just as though they were burnt, and they [245] were just frizzy, they weren't attractive or easy to manage or anything.

Q. Did anything happen in relation to the hair itself physically?

A. Well, it broke off while combing it. The ends were split.

Q. The hair? A. Yes.

Q. What did you finally do?

A. I had it cut.

(Deposition of Mrs. Donald Carlson.)

Q. How long after the application of the wave?

A. Well, I can't say exactly, but it was no more than, no less than a week or no more than two weeks.

Q. And you cut the entire hair?

A. Well, the hair was quite short. The back was so short that you couldn't put a pin curl in it. You could just barely turn the hair around the finger, and the sides were cut according to that, which were short too.

Q. Did you have occasion to, after the application by you of this Cara Nome Rexall wave to your mother-in-law's hair, did you have occasion to see her hair? A. Yes. [246]

Q. Would you describe the condition of her hair?

A. It was the same as mine, strawy, burnt on the ends. When you combed it your ends broke off, you had a comb full of hair.

Q. Have you ever used a Rexall Cara Nome home wave since? A. No.

Q. Could you describe to me whether or not when you opened the bottle of Cara Nome that it had any unusual odor?

A. None other than the smell that most permanents have.

Q. Would you tell me whether or not the use of it on your hands or on your scalp produced any unusual sensation?

A. Well, slight burning, I mean that's not really a burn. It's just your hands may be too tired from

(Deposition of Mrs. Donald Carlson.)

putting up pins, but they feel hot, the ends of your fingers, from the solution; I have always blamed it on, they say it makes them smooth and tender.

Q. Was this particular burning sensation such as you have described any different than that used by or felt by you in other home wave solutions?

A. I don't believe so. Of course, it's been so long, you know; it's been a few years. It's hard to [247] really pin it down whether it was strong or not. The only thing it did, it rusted the bobby pins.

Q. Now when you stated it rusted the bobby pins, will you tell me at what stage and when and how you noticed?

A. We took the bobby pins out of our hair the next morning. You put them in in the evening.

Q. And when taking them out the next morning, is that when you saw the rust on the bobby pins?

A. Yes.

Q. Was that in general or one or two?

A. Oh, general; threw the whole bunch away.

Q. Was it just slight or was it definite?

A. Definite.

Q. Have you ever noticed this condition before in any other bobby pins with any other wave solution?

A. Well, the Cara Nome was the only bobby pin permanent that I have ever had, but on other permanents I have never seen them. After fixing your hair, but I have never had any pin curl permanent.

Mr. Lanier: That's all."

(Deposition of Mrs. Donald Carlson.)

Mr. Lanier: Do you want to read your cross, counsel? [248]

Mr. Packard: Why don't you go ahead and read it, counsel.

Mr. Lanier:

"Cross Examination

Q. (By Mr. Jungroth): You have a full head of hair at the present time? A. Oh, yes.

Q. Now, I believe that you stated that you took the bobby pins out the next morning?

A. They are supposed to be left in to dry. We took——

Q. With the solution on?

A. I forget if it was left on or if you are supposed to wash out, or—I can't tell you now because I never saw another one after it. But your hair was supposed to dry with the pin curls in it.

Q. And you left yours over night?

A. As near as I can figure out, yes.

Mr. Jungroth: I think that is all.

Redirect Examination

Q. (By Mr. Lanier): At least regardless of whether your personal [249] memory recalls the details, you testified that you followed the directions? A. Yes.

Q. Did you or not follow the directions?

A. I did follow the directions.

Q. And if the directions state that after applying the solution, and then applying the neutralizer,

(Deposition of Mrs. Donald Carlson.)
and then thoroughly rinsing the hair that you leave them over night, is that to what you are referring?

A. Yes.

Q. Counsel has tried to imply that you left the solution itself in over-night, without rinsing. Is that correct or not? A. I didn't do that.

Q. In other words, all the solution was thoroughly rinsed out before leaving it on over night?

A. Yes.

Mr. Lanier: That is all."

Mr. Lanier: Would you take the deposition please of Mrs. Carl Carlson.

Whereupon,

DEPOSITION OF MRS. CARL CARLSON witness for the plaintiff, was read, Mr. Lanier reading the questions and Mr. Rourke reading the answers, before the Court and Jury, as follows: [250]

"Direct Examination

Q. (By Mr. Lanier): Would you state your full name? A. Mrs. Carl Carlson.

Q. And where do you live, Mrs. Carlson?

A. In Kensal, North Dakota.

Q. At Kensal? A. Yes.

Q. And that is in Stutsman County, North Dakota? A. Yes.

Q. The young lady who just testified on the stand and deposition previous to you, Mrs. Donald Carlson, is she your daughter-in-law?

(Deposition of Mrs. Carl Carlson.)

A. Yes.

Q. Donald Carlson being your son?

A. Yes.

Q. Now, calling your attention to sometime in March of 1955, did you have occasion, in the company of your daughter-in-law, Mrs. Donald Carlson, to be in the Rexall Drug Store in Kensal, North Dakota? A. Yes.

Q. And for what purpose?

A. To buy a Cara Nome permanent.

Q. And did you make such a purchase?

A. Yes. [251]

Q. And in your presence did your daughter-in-law make such a purchase? A. Yes.

Q. Will you tell me who applied your permanent? A. My daughter-in-law.

Q. And who applied hers?

A. She put her own in.

Q. Did you or not read the rules and directions for the application?

A. You must read them thoroughly because each one that you buy, if you buy different kinds, have a little different method of putting them in.

Q. And did you read them?

A. Yes, thoroughly.

Q. And did you or not meticulously follow those directions? A. Yes.

Q. And do you yourself specifically, as you now sit in the witness chair, remember the application of this particular permanent wave?

A. Well, I just couldn't get up and say just how.

(Deposition of Mrs. Carl Carlson.)

You have some solution you put on, and you pin curl, it's put in with a pin curl, and you have your solution to put on; later on it's thoroughly rinsed [252] with several waters to be sure to get all your solution out, and then you leave it dry thoroughly before taking your pin curls out.

Q. But you do remember the application of this application of this particular Cara Nome?

A. Yes.

Q. Do you recall whether or not you had the solution visible while this was being done?

A. We usually do it in the kitchen and the solution is on the Frigidaire.

Q. And do you know whether or not you meticulously followed the rules that were laid out for timing in the directions?

A. Yes, we did follow them correctly.

Q. Now, on opening the bottle of Cara Nome Rexall home wave, did you notice anything at all unusual about the odor?

A. Well, they all got a pretty hot smell.

Q. Nothing particularly unusual about this one that you noticed?

A. Well, you don't open them up and take a good whiff. They smell bad enough, and you usually push them to the side.

Q. Now, when the wave was being applied to your scalp and hair, did you notice anything at all unusual [253] about your sensations as it was being applied? A. Oh, it was stingy.

Q. Do you recall in this case that it was?

(Deposition of Mrs. Carl Carlson.)

A. Well, yes, I would say yes. It has a kind of a strong—if you get it too close, or it kind of burns.

Q. Do you recall such a sensation with the application and use of any other home wave solution?

A. Well, let's see, that was two years ago and I have had several others and I have noticed it to be that, well, in fact, we never went back to that brand.

Q. You have not noticed it, you say, in the others? A. No.

Q. Now, would you tell the jury what was the condition of your hair, and when, after the application of the Cara Nome Rexall home wave?

A. You mean when I took the bobby pins out?

Q. Yes.

A. Well your bobby pins were all rusty, and your hair, if you are going to comb them out, it was just like, well, you had two colors of hair. At the scalp of your head, if you are dark-headed where it is rolled up, why, it's a lot lighter, and it's just like, just like taking straw, and [254] when you comb your hair, why, your shoulders are just loaded with broken off short hair.

Q. Are you referring now to this particular Cara Nome Rexall permanent?

A. That's right.

Q. And what did eventually happen to your hair?

A. Well, I went, there is a lady in town here now, I just don't remember her name, and I had them cut off.

Q. This being Jamestown?

(Deposition of Mrs. Carl Carlson.)

A. Yes, and I had them cut off real short.

Q. About how long after the application of the home Rexall Cara Nome permanent was this?

A. Well, I had mine probably until the latter, latter part of April until I run it through because my daughter-in-law was at my home at that particular time, and like I told you, Dr. Martin was coming there and I left them a little longer, and then I had them cut off right shortly after that.

Q. Would that be between two and three weeks after? A. I would say yes.

Q. Prior to that time, and after the application and prior to cutting it, had you been able to do anything at all with your hair? [255]

A. Well, you pin curled it and you combed it out, and it didn't make any difference, you just had straw, and as you combed it each day it was just breaking off terribly.

Q. The hair itself? A. Yes.

Q. Have you ever had that experience with any other permanent?

A. No, I never had, and I had a lot of permanents.

Q. Have you ever used any bleaching substance on your hair? A. No.

Q. Any peroxide, anything of that type?

A. No, no type.

Q. To your knowledge, has your daughter-in-law ever so used?

A. No, her hair is always the same color.

(Deposition of Mrs. Carl Carlson.)

Q. Have you ever again used Cara Nome Rexall home wave? A. No.

Mr. Lanier: Your witness."

Mr. Lanier: Shall I proceed counsel?

Mr. Packard: Yes. [256]

Mr. Lanier.

"Cross Examination

Q. (By Mr. Jungroth): You have a good heavy head of hair at the present time?

A. Well, I wouldn't say they are real thick hair, but I have enough.

Q. You have plenty of hair on your head?

A. Yes.

Q. And you won't say that you have lost any hair because of a home permanent at this stage?

A. Well, probably if I had kept that on, or messed around with it long enough, maybe I would be in the same fix at the other was.

Mr. Jungroth: I think that is all.

Mr. Lanier: That is all. Thank you very much."

Mr. Lanier: Plaintiff rests again, your Honor.

Mr. Packard: I have a doctor coming at two, and I know he is pretty busy. I would like to ask Mrs. Nihill just one question.

The Court: Have her come up now them. [257]

Mr. Packard: Yes.

The Court: Mrs. Nihill, will you come forward please.

Whereupon,

MRS. JOHN NIHILL

recalled, resumes the witness stand for further cross examination, as follows:

Mr. Packard: You have been already sworn Mrs. Nihill. You may just have a seat.

Cross Examination

Q. (By Mr. Packard): Mrs. Nihill, have you ever been acquainted with Mrs. Carlson—either one of them? A. Yes, I know them.

Q. And when did you first meet them?

A. Oh, that would be hard to say.

Q. Are you related to them in any manner?

A. No, sir.

Q. Have you seen them socially?

A. Oh, yes.

Q. I take it, in a farm community that—I've heard in the deposition that Dr. Martin was over at their house one night and I take it you have those get-togethers or gatherings, and you see them from time to time, is that correct? [258]

A. Yes, we have community affairs.

Q. And I take it they are quite close friends of yours? A. Well, I wouldn't say that.

Q. But you do see them quite often socially?

A. In town, off and on, yes.

Mr. Packard: That's all.

Mr. Bradish: May I ask a couple of questions, your Honor?

The Court: Yes.

(Testimony of Mrs. John Nihill.)

Further Cross Examination

Q. (By Mr. Bradish): Did you ever talk with either of these ladies after Sandra got her cold wave?

A. After Sandra got her cold wave? You mean——

Q. About the cold wave and about Sandra's condition?

A. Well after Sandra had lost her hair, they volunteered the information about their permanent, yes.

Q. You were talking to them then at that time about Sandra's condition and about the cold wave. Is that right?

A. Well, yes, they knew the condition of Sandra's hair, yes.

Q. And that was all done before these depositions were [259] taken, wasn't it? A. Oh, yes.

Mr. Bradish: That's all.

Mr. Lanier: I have no questions.

Recross Examination

Q. (By Mr. Packard): When was it you first talked to the Carlsons about Sandra's hair?

A. Well you see we live in a little town; everybody kind of knows what's going on there, and after Sandra—well it isn't like Los Angeles. (Laughter.)

Q. I can appreciate that. I understand there's three hundred and fifty in the town, is that correct?

A. Yes.

(Testimony of Mrs. John Nihill.)

Q. And you are in a farm community, more or less, and people live on farms scattered around the town, is that correct? A. Yes.

Q. And so you all know each other fairly well?

A. Yes.

Q. In relation to the time you came back from Seattle—— A. Yes.

Q. (Continuing): Did you talk to them after you came back [260] from Seattle?

A. Oh, it was, maybe—let's see, I think it was—well we had occasion to go up there to get some cream for my mother-in-law——

Q. When was that?

A. It was about—I think it was in the Fall afterwards.

Q. In other words, that would be in the Fall of 1955? A. Yes.

Mr. Packard: That's all the questions.

Mr. Lanier: I have nothing Mrs. Nihill.

(Witness excused.)

The Court: The jury will be excused again. It's the noon hour, and you may separate under the injunction heretofore given, not to talk to anybody or permit anybody to talk to you about the case until you have heard all of the evidence and the arguments of counsel, and instructions of the Court, and be back ready for further service at two o'clock. You may pass.

(Whereupon, at 12:05 o'clock p.m., the hearing was adjourned until 2:00 o'clock p.m.) [261]

Afternoon Session

(Whereupon, at the hour of 2:02 p.m., the hearing in the within cause was resumed pursuant to the noon recess heretofore taken, and the following further proceedings were had in open court:)

Mr. Packard: May I proceed, your Honor?

The Court: You may proceed.

Mr. Packard: Defendant will call Dr. Harvey Starr.

Whereupon,

DR. HARVEY E. STARR

called as a witness on behalf of the defendant, after being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to wit:

The Clerk: What is your name?

The Witness: Harvey E. Starr.

Direct Examination

Mr. Packard: Doctor, now please keep your voice up, so I can hear you back here and all the jurors can hear you. [262]

Q. (By Mr. Packard): Now, will you please state your full name, and your business or profession?

A. Harvey E. Starr; I am a physician and surgeon—M.D.

Q. Do you maintain offices in this city, doctor?

A. 1401 South Oak Street in the California Medical Building.

(Testimony of Dr. Harvey E. Starr.)

Q. And for what period of time have you maintained your offices at that locality?

A. Since 1939.

Q. Now, will you please state to the jury where you obtained your under-graduate education, doctor?

A. My under-graduate education was obtained at high school in Wyoming; Union (?) College in Nebraska; Walla Walla College in Washington. My medical education was obtained at the College of Medical Evangelists, Monalinda, Los Angeles.

Q. Now, Doctor, you are licensed to practice in the State of California, I assume, so will you please tell us the year in which you were licensed?

A. I was licensed in Oregon in 1933 and California in 1934.

Q. And after your graduation from medical school, did you take an internship? A. I did.

Q. Whereabouts did you take that internship?

A. At the Good Samaritan Hospital in Portland, Oregon.

Q. And after your internship, what did you do next insofar as your profession is concerned, doctor?

A. I was in service for awhile with the Indian Service at Warm Springs, Oregon, and I worked in the office of Samuel Ayers, Jr., a dermatologist in this City.

Q. And when was it that you went to work for Dr. Samuel Ayers, a dermatologist?

A. That was '34 and '35.

(Testimony of Dr. Harvey E. Starr.)

Q. Since that date have you limited your practice to any particular specialty or any branch of medicine, sir?

A. I've limited my practice strictly to the field of dermatology.

Q. That's since 1933 or '34?

A. Since 1939.

Q. Since 1939. Are you on the staff of any hospitals in this community?

A. On the staff at the California Lutheran Hospital; I'm on the Senior Staff, I should say.

Q. Now, doctor, do you belong to any medical society?

A. I belong to the Los Angeles County Medical Association; the California Medical Association; the American Medical Association; the Civic Post-Dermatological Association; the Hollywood Academy of Medicine. At [264] the California Hospital I am Chief of Skin Service, have been for the last three or four years and I am Assistant Clinical professor of Medicine and dermatology at the College of Medical Evangelists.

Q. In other words you teach at the College of Medical Evangelists and you are on their staff for teaching purposes?

A. That's right; I'm on the faculty.

Q. And what subjects do you teach?

A. Dermatology.

Q. Now, Doctor, you had an occasion at my request, I believe Monday, to examine the plaintiff Sandra Nihill. Is that correct?

(Testimony of Dr. Harvey E. Starr.)

A. That's right.

Q. And prior to the examination of Sandra Nihill, did you have an opportunity of acquainting yourself with her history before, or prior to, the examination?

A. Yes, I had the depositions which you gave to me and I read all of these depositions, studied the pictures, and——

Q. Generally familiarized yourself with the findings of her attending physicians and Dr. Michelson. Is that correct?

A. That's right. With Dr. Martin, I think it was, from [265] her home town, and then Dr.—I think it was Melton, at Fargo, and Dr. Michelson in Minneapolis.

Q. Are you acquainted with Dr. Michelson, sir?

A. I have met Dr. Michelson and we have contact once in awhile. If I have patients going to the Minneapolis area and they need care back there or going there, why I usually recommend them to Dr. Michelson and he in turn——

Mr. Lanier: One moment, if the Court please, I move an objection as being totally immaterial.

The Court: I think so.

Q. (By Mr. Packard, resuming): Dr. Michelson is one of the leading dermatologists in the world, is that correct?

A. I reckon Dr. Michelson is one of the leading dermatologists in the world.

Q. Now, at the time you examined Sandra Nihill, you then were familiar with the history of this case?

(Testimony of Dr. Harvey E. Starr.)

A. That's right.

Q. And did you take any further history from Sandra Nihill, or her mother, on Monday, which I believe, or Tuesday, I'm sorry, it's Tuesday I believe April 8th? A. It was Tuesday, that's right.

Q. April 8, 1958. Did you take a further history, doctor? [266] A. Yes.

Q. And would you please state what your history was at that time that you took?

A. One of the things that came to my mind in reading the depositions was what treatment Sandra had received for this condition, and I asked Mrs. Nihill about local applications. I was interested of course about even the shampoo that might be used, or being used, and I asked about local applications because I was interested if any oily materials had been used on the scalp because of the dryness of the hair and the scalp, and the only thing that I could elicit that we could say was really treatment, now the Breck shampoo has been used and as I understand Wildroot Hair Oil had been used, but Dr. Melton at Fargo had prescribed thyroid substance, and that had not been continued, and I asked Mrs. Nihill why and she felt that it was making Sandra thick through the hips and so she said she had her stop it. I asked her if Dr. Michelson prescribed any treatment and she said no.

The Court: She told you about the selsum? She told you about that?

The Witness: That's right. [267]

Q. And you were familiar about the selsum solu-

(Testimony of Dr. Harvey E. Starr.)

tion by the deposition too, is that correct, of Dr. Martin? A. That's right.

Q. Now, did you then conduct an examination of plaintiff, Sandra Nihill, doctor?

A. I checked Sandra, her scalp, of course, first.

Q. And what did you find insofar as your examination and findings at that time?

A. I was a little bit surprised to see that her hair was light because I expected to see it dark because of the original picture. I had pictured Sandra as being a brunette, but her hair is rather light and her mother told me that she was naturally a blonde; she certainly has nice blonde skin. The hair on her scalp is a good growth. The hair is of different lengths——

The Court: What kind of growth did you say, doctor?

The Witness: It's a good growth.

The Court: A good growth.

A. But it's dry and it's brittle, and I checked Sandra's eyebrows and she has eyebrows present, they are blonde, you can see those right at the edge of the eyebrow pencil and to my fingers, I ran it across the eyebrow [268] area, it felt like there was a fair growth of eyebrows. I checked the eyelashes. The eyelashes are not too heavy, and I commented on that and Mrs. Nihill told me that her eyelashes weren't too heavy either. I checked Mrs. Nihill's eyelashes but her eyelashes are heavier than those of Sandra. I don't know that that would be pertinent. Then I checked the axillary hair, the

(Testimony of Dr. Harvey E. Starr.)

hair on the arm-pit and the hair on the arm-pit had been shaved, but there seemed to be a fair field of hair growth there, and I checked Sandra's skin to see if there was any dryness, and I always feel that a good point to check for dryness of the skin is right on the extensors of the elbows, the points of the elbows, and Sandra's elbows are very dry and thick. I checked her fingernails. Her fingernails are not of too good quality, and she is a nail biter. I think that the nails go right along with our findings in these scalp or hair conditions because hair and nails have a similar structure.

Q. Now, doctor, as a result of the examination and findings you made on April 8th, and taking into consideration the history that you had obtained from the mother, as well as the history, treatment and findings that you had read in Dr. Melton, Dr. Martin and Dr. Michelson's depositions and their findings and lab tests and so [269] forth, taking all of that information, have you an opinion at this time of the condition from which Sandra is presently suffering?

Mr. Lanier: Object to it, if the Court please. No proper foundation laid and improper hypothetical question, not including everything that's necessary.

The Court: Overruled. He may answer.

Mr. Lanier: One moment, your Honor. That question is not based upon reasonable medical certainty.

The Court: Well that's true; you rather insisted

(Testimony of Dr. Harvey E. Starr.)

on that on counsel for plaintiff's attorney; I suppose you should include that in your question.

Mr. Packard: I'm asking this doctor, from his findings, his personal examination, as to whether he has an opinion of the condition from which she is suffering.

The Court: He can answer the question yes or no?

Mr. Packard: Have you an opinion?

The Witness: I have an opinion. [270]

Q. What is your opinion, doctor?

Mr. Lanier: Object to that as no proper foundation laid, your Honor.

The Court: Sustained.

Q. Have you an opinion, within reasonable medical certainty, doctor, of the condition from which Sandra is suffering at the present time? Just say yes or no? A. Yes.

Q. And what is your opinion, sir?

Mr. Lanier: Now, may it please the Court, may I ask one or two questions preliminary to a possible further objection?

The Court: You may.

Mr. Lanier: Thank you.

Questions by Mr. Lanier:

Q. Dr. Starr, how long was Sandra actually in your examining room?

A. About twenty-five minutes.

Q. How long did you actually examine her?

A. It would be about that same time.

(Testimony of Dr. Harvey E. Starr.)

Q. Your examination covers that, and that only, which you have, up to now, testified to? [271]

A. That is correct.

Mr. Lanier: That's all.

Q. (By Mr. Packard, resuming): Well, I'll ask one further question, but prior to the examination, had you completely read the testimony of Doctor—have you read any testimony of any Doctor, in connection with their care, treatment or examination?

Mr. Lanier: Objected to, as repetitious, your Honor.

The Court: He may answer.

A. I had read Dr. Martin's and Dr. Melton's and Dr. Michelson's report.

Q. You had read the entire report?

A. Read the entire report.

Q. Now would you please—there was an objection to the question——

The Court: I don't think so anymore.

Q. All right. Go ahead then. I am asking you, Doctor, to state your opinion as to the condition which Sandra is suffering at the present time, within reasonable medical certainty? [272]

A. Might I, your Honor, review in my mind how I arrived at——

Q. I'll ask you for your reasons after you tell me your opinion; give me your opinion, then I'll ask you to explain the reasons.

A. Well, there were two conditions to be considered. Maybe we should say three. No. 1, was

(Testimony of Dr. Harvey E. Starr.)

the complaint that this hair loss had been sustained, purely and simply, from the use of a permanent wave solution. No. 2, from the fact being brought forth, that the hair had been lost from the scalp, also from the eyebrows and the eye lashes, with probably sparse growth elsewhere, one would have to also think of either a congenital condition or a picture of familial type of hair distribution, or an alopecia areata; and (3), another commonly observed picture, fragilitis crinium, or simple dryness of the hair.

Q. Now, doctor, if I may interrupt, just before you go any further, I would like to state to you, assume further in your consideration and in the forming your opinion and in stating your opinion, that within the last week an examination had been made of the pubic area at which time the pubic area showed sparse hair with almost complete lack of hair in certain areas, assume that further in your consideration. Will you do that? [273]

The Court: Before you answer further, will you kindly give me that third condition? I couldn't follow you.

The Witness: Fragilitis crinium. Fragile hair.

The Court: Thank you.

Q. (By Mr. Packard, Resuming): All right, you can go ahead, doctor.

A. After having read the depositions and the opinions of the doctors, of course I went back to Dr. Martin's deposition that he saw Sandra and her hair was coming out. I think that Dr. Martin

(Testimony of Dr. Harvey E. Starr.)

said that he saw Sandra once, that would be in February of that year that she had the permanent, and then he saw her again that summer. Now, on the occasion of the first visit he had prescribed selsum suspension, and he had found Sandra's hair dry, and some scale, and I feel that Dr. Martin was correct in his feeling there because so many time so-called seborrheic dermatitis will have its onset at puberty. There is an over-activity of the oil gland, and we see many of these individuals and adolescents breaking out with black-heads and pustules with so-called acne eruption. And associated with it of course is an oiliness of the scalp, and so-called dandruff, and the scalp can itch [274] and be unbearable and people can scratch it and they can get secondary infection. Now, while the scalp is oily, the hair at the same time may become quite dry and brittle, which gives us the picture that we see so many times in seborrheic dermatitis, and in this condition, if it is allowed to go on and on, it can give rise to recession of hair in the forehead area and a bald patch like I have on the back of my head. So, I feel that Dr. Martin's assumption that this could be a seborrheic dermatitis could be correct. I do not have any way of knowing whether he was told or was notified that Sandra had had a permanent wave, using a cold wave solution or not——

Mr. Lanier: May it please the Court. I'm going to interrupt at this point, after having listened for

(Testimony of Dr. Harvey E. Starr.)
quite a while, and move now that all of this testimony be stricken as not responsive.

Mr. Packard: I think, your Honor, he is explaining his opinion, which he has a right to do as a medical expert.

Mr. Lanier: Please the Court, it's well established that one doctor can not establish and base his opinion upon the opinion of another doctor.

Mr. Packard: He may use that as case history. Counsel did it himself with Dr. Levitt. He asked Dr. Levitt, "Did you read these depositions", "Did you familiarize yourself with those pictures", and so forth. This is certainly proper on the basis of a——

The Court: I'm inclined to think Mr. Lanier is right, Mr. Packard, to the extent that he shouldn't base his testimony on the opinions of the other doctors, and the findings of the other doctor I think it's perfectly right for him to take——

Mr. Packard: Are you basing your opinion—pardon me, your Honor. I'm sorry.

The Court: I think that he should not base his opinion on their opinions, but rather on the findings that are disclosed by the depositions and by his own examination.

Q. Now, let me ask you this, doctor, to go back, so we understand each other, and progress here with rapidity, do you in any wise base your opinion as to the condition from which Sandra is suffering at the present time upon any of the opinions of any

(Testimony of Dr. Harvey E. Starr.)

of the other doctors whose depositions you have read? A. No. [276]

Q. What do you base that upon?

A. The inspection that I made on Tuesday.

Q. Did you use the history of the other doctors insofar as their clinical findings are concerned and the history they took for the purpose of assisting you in arriving at your opinion?

A. Yes, I would certainly say that.

Q. Now, will you please state to us—give us what your opinion was insofar as the condition from which she is suffering at this time—your opinion?

Mr. Lanier: Objected to, if the Court please, upon the grounds there is no proper foundation laid.

The Court: Overruled.

A. We have the history that the hair fell out——

Q. Let me interrupt you just for one second. Tell me what your opinion is and then I can ask you to explain how you arrived at that opinion?

A. My opinion is this is a case of fragilitis crinium.

Q. And what are your reasons—you can state to me now all the reasons that you considered in arriving at this diagnosis. So now you can explain what your reasons are.

A. Fragilitis crinium is rather a common condition. The [277] hair is dry and is of uneven length; it's fragile, so that it breaks off. That's why the hair has that sort of uneven appearance.

(Testimony of Dr. Harvey E. Starr.)

There may be a light amount of scale on the scalp. The skin of the body is generally dry and we do know that there are, with people who have this condition, usually have underlying, and underlying physiological explanation for it.

Q. Now what do you mean by an underlying physiological explanation, doctor?

A. Well one of the most common things, of course, that we find underlying this condition is a hypothyroid state.

Q. What is a hypothyroid state?

A. Hypothyroid? Under-activity of the thyroid gland.

Q. And what does under-activity of the thyroid gland produce or cause in the human body?

A. Well, of course, there's a varying picture, depending upon probably the severity of the condition but, by and large, people who suffer from this condition are underweight, not always so; they have dryness of the body skin, especially of the scalp, there can be sparse hair growth, the nails can be of poor quality, and so the picture can go on to where it even can go over and affect the mental picture, a person may not be as sharp as usual. [278]

Q. Now, doctor, did you consider, in arriving at your opinion, the condition of alopecia areata?

A. Yes, I did.

Q. Did you, in connection with alopecia areata, make a differential diagnosis, in arriving at fragilitis crinium?

A. That's right.

(Testimony of Dr. Harvey E. Starr.)

Q. And what is the differential diagnosis?

A. The onset, of course is sudden, in alopecia areata, and usually the hair comes out in discrete areas, so that we have distinct bald patches. Those areas from which the hair has disappeared are perfectly smooth, they show no signs of inflammation whatsoever. The hair just vanishes, that's all. Now the cause of alopecia areata still remains undetermined and it can be seen in almost any range of life. It is most frequently seen between the first and third decades of life.

Q. Do you see it in children of tender ages?

A. Yes; there have been cases of alopecia areata reported in individuals as young as fifteen months.

Q. Now, insofar as your diagnosis of fragilitis crinium, did you form an opinion as to what was causing this particular condition? [279]

Mr. Lanier: Objected to as no proper foundation laid, your Honor.

The Court: Overruled. That can be answered yes or no, doctor.

A. Yes.

Q. And will you please explain what, in your opinion, were the cause or causes of this condition?

Mr. Lanier: Same objection; there's no foundation, your Honor.

The Court: Overruled.

A. We know, for instance, in local care of the scalp, that a person can produce a dry scalp, dry hair, by using strong soap solutions, say in sham-

(Testimony of Dr. Harvey E. Starr.)

pooing the scalp every day. A person with a normal scalp or a normal head of hair could produce in themselves a dry, brittle hair by just local care, that's why local care becomes important for consideration, and in fragilitis crinium, of course we are also interested in those underlying physiological causes. Now, we've already mentioned thyroid activity. Vitamin A has been shown to be of definite influence on the degree of oiliness and fragility of the hair. Estrogenic substances are also important, and iron metabolism is certainly important. People who have a secondary [280] anemia may begin to present this type of a picture. We see this type of a picture sometimes, not too uncommonly, in pregnancy and, there of course, iron is indicated as a medication for this patient. Now with those various physiological causes, taken into consideration, the condition of fragilitis crinium can certainly be improved.

Q. Now, Doctor Starr, we have here a diagram, which has been marked "A" for identification. This is a hair, the red part, I believe, is the part that is non-vital—it's a hair shaft—maybe I shouldn't use the term "non-vital", but it's a hair shaft, "epidermis", "dermis", "fat gland", and so forth. Now, insofar as the present hair growth in Sandra's head is concerned, is that growth, as far as the bulb, alive, in a bulb, the hair can be reactivated, in your opinion?

Mr. Lanier: Objection of the court please, it's leading, no foundation laid.

(Testimony of Dr. Harvey E. Starr.)

The Court: If he has an opinion he may give it.

A. If a hair is present, it certainly is growing and it's viable. When there is no hair, we might assume that that pappila, which is really the germ center for hair growth, may be destroyed, but we can go back to [281] alopecia areata again. We can have alopecia areata where we can have a perfectly smooth area on the scalp. It doesn't look like—there's no hair out above the surface of the skin, and yet alopecia areata that hair will come back. The only way you could prove that, of course, would be by taking a piece of the tissue and examining it. Now, Dr. Melton did do a biopsy in Sandra's case.

Q. And what did that show?

Mr. Lanier: Objected to, if the Court please,—hearsay.

Mr. Packard: It's in the record.

Mr. Lanier: The deposition speaks for itself, your Honor.

Mr. Packard: Well, then, I don't want to take the time, I'll—I think, your Honor, it's just wasting the time of the Court, I can ask the doctor——

The Court: Well, perhaps you better get the deposition in view of the objection.

Q. (By Mr. Packard, resuming): (Reading from deposition of Dr. Melton) "A biopsy of the scalp was reported. Sections show somewhat keratinized stratified squamous [282] epithelium which is everywhere composed of mature and well differentiated cells". Now, what does that mean?

(Testimony of Dr. Harvey E. Starr.)

A. Well, we have a skin here and, of course we have a follicle opening. Right here is the follicle opening, (Witness is demonstrating by the use of the diagram marked Defendant's Exhibit A for identification), this is our normal horny layer of the skin. Now, it's rather interesting that keratin, which is an albumen-like subtance, one of the so-called fibrous proteins, makes up the outer surface of the skin, but also makes up our hair and nails. This is normal skin here and as this hair grows outward this shape planning grows right along with the hair and when it comes up here to the opening of the sebaceous glands for the contents of the glands to put out, those cells also intermingle with that and come on out. In your acne cases, where there is obstruction of this follicle opening and we have retention of cellular or fat material in the sebacious glands or from the cellular activity, they block up and give us the black-head or our little——

The Court: Are you explaining the answer that the doctor gave?

The Witness: Yes, I'm trying to give it right now.

The Court: All right. [283]

A. (Continuing) In certain conditions, like alopecia areata, or even in fragilitis crinium, we find that the size of the sebaceous gland is lessened. In other words, sometimes you could even speak of it as atrophy, but it is lessened, and in the case of seborrheic dermatitis, you will find evidence of

(Testimony of Dr. Harvey E. Starr.)

definite inflammation around this follicular opening because that's where the inflammation takes place in seborrheic dermatitis. It will show an inflammatory picture at that time.

Q. And is that what was explained——

A. Now, by Dr. Melton's biopsy, he said that, in his report, that there was a diminution in the size of the sebaceous glands.

Q. And that is the gland that throws off oil, is that correct?

A. That's right. Now his findings there, of course, substantiate two things, that there could be an alopecia areata or a fragilitis crinium.

Q. In other words, the natural oil going to the hair would come from that fat gland, is that correct? A. That's right.

Q. And there had been a diminution or lessening in the size of that fat gland, is that correct?

A. When the gland was diminished in size, of course, its volume of output is going to be less, that's all. [284]

Q. Now, have you an opinion as to whether the diminution in size of a fat gland could be caused by the application of an external solution, or chemical?

Mr. Lanier: Objected to; there's no foundation laid, your Honor.

The Court: He may answer.

A. The scalp or the skin itself is quite impervious to the passage of fluids or liquids. We all know that by standing in a shower and bathing ourself,

(Testimony of Dr. Harvey E. Starr.)

that our skin and scalp is quite impervious because the water doesn't get through into those openings and get below the surface of the skin. There can be absorption by the use of ointments, and we know in the case of hair dyes that sometimes there has been adequate absorption directly through the skin, probably enough that it could produce damage. For instance, one of the old treatments was the use of mercury ointment rubbed onto the skin, so it would absorbe it through the skin, but a solution would have to certainly be in contact with the body for a considerable period of time to produce an effect.

Q. And to produce an effect, would you expect the person receiving this effect to have some sensation of feeling of the solution on their head, if there was a chemical reaction or a chemical burn taking place? [285]

A. If there was a chemical burn, yes; if there was a hypersensitive state, yes; but a person still could have some absorption of a substance and not be aware probably that it was being absorbed. I don't think that that would always have to stand, that they would be aware that something was being absorbed through the skin. It could happen without them being aware of it.

Q. Have you an opinion as to whether the application of a cold wave permanent, assuming the same to be within normal limits of those usual home wave kits, assuming that one application was given of a cold wave solution to the hair and the solu-

(Testimony of Dr. Harvey E. Starr.)

tion came into contact with the skin, would you have an opinion as to whether such an application would cause damage to any underlying tissue?

Mr. Lanier: Objected to. No foundation laid, your Honor.

The Court: He may answer if he has an opinion.

A. I have an opinion.

Q. And what is your opinion, doctor?

Mr. Lanier: Same objection, your Honor.

The Court: He may state his opinion.

A. Everyone in the field of dermatology have seen patients [286] who have used cold wave permanents which came into vogue about four or five years ago, about '52 I guess it was, and we have all had patients that come in complaining of dryness of their hair because they abuse the cold wave, and some of these cases of dryness have been pretty severe, but in my experience all of these patients have recovered their normal hair growth. The application of an emmolient, an oil, to the hair and using an oily shampoo for cleansing and after a period of time, aside from the time when they are inconvenienced by the cosmetic unsightliness of the dry hair, why their hair returns to its normal healthy state.

Q. What is your opinion, doctor, insofar as to whether the application of a normal solution, would it damage any of the underlying tissues, in your opinion? A. No.

Mr. Lanier: One moment, doctor. I move the

(Testimony of Dr. Harvey E. Starr.)

answer be stricken to give me time to state an objection.

The Court: It may be stricken for you to state your objection.

Mr. Lanier: Objected to, there is no foundation laid, your Honor.

The Court: He may answer. [287]

Mr. Packard: The answer is already in, I think, your Honor.

Q. Now, doctor, have you, in your practice, treated these people that have had damage to their hair, such as dryness by reason of home permanents? A. Yes.

Q. And have you in your practice ever had any case where a person had suffered permanent loss of hair, permanent damage to the hair, by reason of the use of a home cold wave permanent?

A. I have not.

Q. And do you know of any ever having been reported?

A. I know of no cases having been reported where hair loss was permanent from the use of the home cold wave.

Q. Now, doctor, have you an opinion as to whether the plaintiff, Sandra Nihill in this case, through the proper medical supervision, treatment and care, could in your opinion, within reasonable medical certainty obtain a normal regrowth of hair—do you have an opinion?

A. I certainly do.

Q. What is your opinion, doctor?

(Testimony of Dr. Harvey E. Starr.)

A. With my opinion being that this is a fragilitis crinium I feel that, were I treating Sandra, I would want to know right away again about her thyroid state. That [288] could certainly be rechecked by a basal metabolic test although we have our clinical evidence to guide our feelings therapeutically. No. 2, I would certainly want a blood count to see what her—and a hemoglobin estimation, to see what her blood picture was. Now, knowing that Vitamin A is beneficial in these type of cases, and for dry skin, I would right away start administration of Vitamin A, and the thyroid dosage of course would be decided by the degree of minus metabolism that she might show, and then a proper blood builder or iron-fraction containing substance administered. And locally, I would see that she only shampooed the scalp once a week, using an oil or a cream shampoo and using an oily dressing on the scalp at daily intervals.

Q. And with that treatment, have you an opinion as to whether she would——

A. I have a reasonable feeling that Sandra would show——

Mr. Lanier: One moment, doctor. Object to it, there is no foundation laid.

Q. Have you a reasonable opinion, based upon reasonable medical certainty that she would have a re-growth of hair?

Mr. Lanier: Same objection, your Honor. [289]

The Court: He may answer.

(Testimony of Dr. Harvey E. Starr.)

A. I have a feeling that Sandra would have nice results.

Mr. Lanier: I move the answer be stricken, your Honor, as not being responsive——

The Court: Overruled. It may stand.

Mr. Packard: You may cross-examine.

Cross Examination

Q. (By Mr. Lanier): Just one question which didn't come out in your background, doctor, you did not state whether or not you had passed the American Board of Dermatologists?

A. I am not a Board Member.

Q. You are not a Board Member?

A. That's right.

Q. Is not that the standard way to become known as a specialist, as a dermatologist?

A. I think it is at the present time.

Q. So, at the present time at least, you do not have the accepted rating of a dermatologist?

A. If I was not so accepted, I would not be on the faculty of an approved Medical School. [290]

Q. But you are not accepted as such by the American Board of Dermatology?

A. I have never applied for the Board.

Q. Thank you. And now you have also stated that you do rate Dr. Michelson as one of the top outstanding dermatologists in the United States?

A. That's right.

Q. Probably one of the three or four, is he not?

A. Well, of course, America is blessed; we have

(Testimony of Dr. Harvey E. Starr.)

a good many outstanding dermatologists, but certainly Dr. Michelson is one of them.

Q. Thank you. You would be a little bit hesitant, would you not, doctor, to be completely contrary to his opinion?

A. No, I think any of us that have had experience in the field are justified to have our own opinion regardless of who gives it.

Q. All right. What time, doctor, did Sandra Nihill come to your office on Tuesday of this week?

A. At five minutes to one.

Q. And how long did you have her wait?

A. Well I don't know how long she waited out in the reception room, but we brought her into one of the examining rooms around five minutes to one. Our starting time there is at one o'clock, and I tried to get [291] Sandra in just a little bit ahead of our starting time for seeing patients.

Q. And what time did she leave the examining room?

A. I think it was about one-twenty-five.

Q. And that concluded your examination?

A. That's right.

Q. She was examined by you at the request of whom? A. Robert Packard.

Q. Now, as a result of that examination, you gave Mr. Packard a report, I presume, before you came on the stand, did you not?

A. That's right.

Q. And the report that you gave Mr. Packard was first transmitted to him when?

(Testimony of Dr. Harvey E. Starr.)

A. Well I gave Mr. Packard——

Mr. Packard: Well, now, just a moment. I think you should ask him if the report was written or oral.

Q. (Mr. Lanier, resuming): Well let's start there then, did you give Mr. Packard a written or an oral report?

A. I gave him an oral report.

Q. You gave him an oral report. Have you ever given him a written report? A. Yes.

Q. All right. Now, when did you give him the oral report? [292]

A. I gave him the oral report Tuesday night.

Q. Tuesday night. Do you remember approximately what time?

A. It was after I returned from the office; it was probably around eight-thirty.

Q. Was that P.M.? A. P.M.

Q. About eight-thirty p.m. When did you give him the written report?

A. I gave Mr. Packard the written report after I had read the depositions.

Q. And that would be sometime the next day, would it?

A. No, that was back about probably three weeks or so ago; three or four weeks ago.

Q. About three or four weeks ago?

The Court: You gave him the written report earlier than you gave him the oral report?

The Witness: Yes. I gave him my opinion of what all these depositions meant.

(Testimony of Dr. Harvey E. Starr.)

Q. So you gave him a written report three or four weeks ago, before you had ever examined or seen Sandra Nihill? A. That's correct.

Q. And from the time that you examined her, at about one o'clock on Tuesday of this week, you did not give him [293] any report of that examination until eight-thirty that evening?

A. That's right.

Q. So if, at ten minutes after three, Tuesday afternoon, in this court-room, Mr. Packard stated to this jury what you would testify to, as a result of that examination——

A. Maybe I should say too Mr. Packard did call me, after I had examined Sandra. He probably called me, it was about maybe ten of two, that day.

Q. Oh, there was an oral conversation before eight-thirty?

A. Yes, there was, that was on the 'phone.

Q. That's one you forgot?

A. I had forgotten that.

Q. What time was that?

A. That would be about ten of two, I think.

Q. Ten minutes to two. A. Umhum.

Mr. Packard: You had to wait in chambers——

Mr. Lanier: Do you want to testify, counsel; I'll be glad to put you up there.

Mr. Packard: I'll testify to that fact. [294]

Mr. Lanier: All right, counsel.

The Court: Proceed.

Q. (By Mr. Lanier, resuming): Now, in your

(Testimony of Dr. Harvey E. Starr.)

examination, you examined the hair and scalp, the eyebrows and the eye lashes and the axillary hair, under the arms? A. Yes.

Q. No more? A. That's right.

Q. And you made no pubic examination?

A. I made no pubic examination.

Q. And prior to knowing of any pubic examination, made by Dr. Levitt, your opinion originally was based without that examination—correct?

A. I felt that I had seen adequate to confirm my diagnosis and for that reason I didn't feel that an examination of the pubic area was of particular interest to me.

Q. Even though the hair under the arm was shaved? A. That's right.

Q. And, as a matter of fact, it makes no particular difference in your diagnosis now, does it?

A. No, I don't think so.

Q. And it's your testimony that there's a fair growth of eyebrows? [295] A. Yes.

Q. Now, you also stated, doctor, that one of the things you are interested in, was the dryness of the skin, and that you thought that one of the best places to check that was the elbow. Isn't that the place where we are usually going to find most dryness?

A. No, I don't think so necessarily, but when we find patients that have marked thickening of the skin overlying the extensors of the elbows, it's a pretty good denominator that they have dry skin, or

(Testimony of Dr. Harvey E. Starr.)

that skin area if it wasn't dry, it would be pliable and soft.

Q. And if I have that condition on my elbows I have dry skin?

A. Well you would certainly have to have it in other areas. She has it in her scalp, her whole scalp is dry.

Q. How about the examination of her body skin, as a whole doctor?

A. The skin of her fore-arms, the skin seems to be on the dry side.

Q. What do you mean by the dry side?

A. Well, when a skin is oily you can certainly feel the oil on it, can't you?

Q. I'm not answering questions, doctor.

A. You feel the feel, when you run your finger over a skin that is oily, you feel the skin, it has that film [296] on; if it's dry it feels dry, it has a dry feeling just like it had been freshly, newly, washed.

Q. You felt Sandra's arms and felt that that was lacking? A. That's right.

Q. How about the shoulders?

A. Same way.

Q. How about the back?

A. I didn't go down the back.

Q. And you don't testify as to that?

A. No.

Q. Now, I want an explanation of what you mean, doctor, when you say that fingernails are not of good quality. What do you mean by good quality fingernails?

(Testimony of Dr. Harvey E. Starr.)

A. Well a nail that is growing usually has a nice margin at the free end. The nail has a good color and as you feel of it, it has a firm bed. Now, with Sandra's nails, they have a feeling of being thin. If you press down on the nail, they are not like my nail, hard, firm, the free margin is gone on all of the nails and they have a—you would feel better if they had a heavier body to them.

Q. You would feel better? A. Yes.

Q. Does free margin have anything to do with biting them off? [297]

A. It could be that being a nail-biter keeps those down, but still at the free margin, they are not that thickness that a nail of good structure should be.

Q. Do you think that it's normal that a young girl thirteen years old or sixteen, that lost all of her hair, might be a nail-biter?

A. I think that nail-biting is considered as a nervous manifestation regardless of age.

Q. And don't you think that that would be something that might create a nervous condition in a girl?

Or aren't you willing to concede that?

A. So many things can enter in to what might make a person tense and give an expression, certainly I will concede that; when a person is biting their nails, that certainly is a manifestation that they have a nervous tension.

Q. All right. Now, doctor, in a girl sixteen years of age would you expect her nails to be as heavy and as thick as yours?

(Testimony of Dr. Harvey E. Starr.)

A. No, I wouldn't expect them to be as heavy and as thick as mine.

Q. Would you expect a girl of sixteen, or any girl, to have as thick nails as a male?

A. No, but I would expect her to have a good nail, and when I find a nail that is not of too good quality and hair that is not of too good quality, I feel that the two [298] conform to the same pattern. That's why I check the nail, they are of the same structure.

Q. At least that's as much explanation that you can give me on the bad quality of her nails?

A. That's right. I wouldn't say "bad quality" either. They could be sturdier, but I wouldn't say bad quality.

Q. All right. Now, then, they are not bad quality, doctor? Correct? A. That's right.

Q. Now, doctor, on direct, you gave three possible causes, from your examination and opinion as to the case history of Sandra's present condition. One of them, you stated was a condition of what you called fragilitis crinium, is that it?

A. (Nods head affirmatively.)

Q. The other alopecia areata, and the third, I never did get. You started off with three and I never did get the third. What's the third possibility?

A. The third possibility was the condition that would be here and could be kept going by improper care of the scalp or lack of treatment.

Q. What would you call it?

(Testimony of Dr. Harvey E. Starr.)

A. Well, for a better name, let's just say inattention, or lack of treatment to this condition. [299]

Q. A condition originally caused by the home wave solution?

A. Well, let's accede that this started with the home wave.

Q. You admit at least that that's a possibility?

A. No, I'm just saying let us start with that.

Q. Do you admit that's a possibility, doctor?

A. We know that when home wave solutions are used——

The Court: Can you answer that yes or no, doctor?

The Witness: Then I would have to say no, the way this was stated, your Honor.

The Court: You say no then and let him ask further.

Q. (By Mr. Lanier, resuming): Would you tell me, doctor, that you don't see cases of loss of hair caused by home waves? A. I so testified.

Q. And that is your testimony yet?

A. That is my testimony.

Q. So that could be the condition which started it, is that correct?

A. That wouldn't be fair to answer on that question as it is so stated.

Q. Why wouldn't it, doctor?

A. Because we don't know what the picture of Sandra's scalp might have been before this home wave was applied. [300]

Q. You haven't read the deposition of Dr. Martin——

(Testimony of Dr. Harvey E. Starr.)

A. Nobody saw Sandra's hair. No doctor saw Sandra's hair before the home wave was given.

Q. All right doctor, I think that satisfies me.

Now, doctor, also you implied, you never did get on with it, that you said something, you at least used the term "congenital condition." Now what did you mean by congenital condition might have been causing this?

A. Well in the field of alopecia—and we have many alopecias of course—one of these alopecias of course is so-called congenital, and here of course we can have individuals born without hair on certain areas of the body that normally would produce hair, and sometimes we have a pattern of hair distribution that is familial.

Q. When you speak of congenital, doctor, you speak of from birth, do you not?

A. That's right.

Q. Is there anything in the case history of this girl that would make you put that conclusion in the case?

A. The only reason that that was brought in sir, was because when I checked Sandra's eye lashes Mrs. Nihill said that she also had some scanty eye lashes herself, and the only reason I mention that is because there can be a familial tendency for hair distribution. [301]

Q. Well, you certainly rule that out of any consideration in this case? A. Yes.

Q. All right. Now, doctor, one of your principal statements, and testimony, for diagnosis of fragi-

(Testimony of Dr. Harvey E. Starr.)

litis crinium, instead of alopecia areata — at least which you state—is because of a hypothyroid state. Correct?

A. No, I wouldn't say it that way sir.

Q. All right, let's see, that was your testimony. Let's see how you would say it, what is your principal reason then?

Mr. Packard: I object to that; that's not his testimony.

The Court: I think you are a little bit out of order in stating what his testimony was and leaving it so. Of course, the jury will be the judge of that. That remark may be stricken.

Mr. Lanier: All right, your Honor.

Q. (Mr. Lanier, resuming): Now, doctor, let's get your reasons right now for your diagnosis of fragilitis crinium?

A. We know that in fragilitis crinium, by observation of these cases and study of these cases, not just one but hundreds of them, by many independent observers, that [302] there are certain underlying physiological causes which, if you are going to have successful treatment in this case, they must be given attention to, and I mention hypothyroid——

Q. I am not asking about treatment, I'm asking you about your diagnosis of fragilitis crinium—why?

A. All right, the picture of fragilitis crinium is a dry scalp and dry hair, and the hair is fragile. It breaks off, it's of different lengths and it doesn't grow out like a normal head of hair. Sometimes

(Testimony of Dr. Harvey E. Starr.)

these individuals can even feel like it's parasitized and they may brush it, thereby increasing the damage that is already there, augmenting the hair breakage that is already present.

Q. Is that your only reason?

A. That's right.

Q. No other reason?

A. Of course I had the depositions and the findings of the other doctors. If Sandra was a patient of mine, say as of now, I would certainly want to put her through these various tests again to see that they were substantiated.

Q. Now, doctor, would you tell me, in a fragilitis crinium situation, would you tell me (1) the clinical tests that are standardly made. Maybe I better reframe that doctor. First of all you feel that one of [303] the treatment would be thyroid—correct?

A. That's right.

Q. If there is bodily need for thyroid?

A. One, yes. If you have clinical signs that indicate a hypothyroid state.

Q. All right. Now, then, in order to ascertain that, what is one of the clinical tests that you would make, standard?

A. All you would have to do is No. 1, inspection.

Q. Inspection?

A. Dryness of the skin and scalp.

Q. You don't make any clinical tests?

A. Are you referring to a clinical test or to a laboratory test?

Q. Laboratory test.

(Testimony of Dr. Harvey E. Starr.)

A. All right, that's different.

Mr. Packard: There's a difference between — I think the record should be clear between clinical and laboratory. I think he has been confusing the doctor when he says "clinical."

Mr. Lanier: Highly possible counsel.

Mr. Packard: All right. [304]

Q. (Mr. Lanier, resuming): What laboratory tests would you make?

A. The laboratory tests would be the protein-bound iodine determination and a basal metabolism test.

Q. Two of them—they're about the same, aren't they, doctor? A. No, I don't think so.

Q. Now, doctor, would you tell me, in your opinion, that if a radioactive iodine test was taken and was normal, that there could be thyroid difficulty?

A. The radio iodine uptake has become a fairly standard procedure in those cases in which we think of adenoma of the thyroid gland, but I see no reason for it to be used where we don't suspect the presence of an adenoma.

Mr. Lanier: I move the answer be stricken as not responsive, your Honor.

The Court: Overruled. It may stand.

Q. Will you tell me, doctor, whether or not, if a radioactive iodine test is normal it indicates any need for thyroid?

A. If I saw the clinical——

The Court: Answer the question doctor.

A. I would say no.

(Testimony of Dr. Harvey E. Starr.)

Q. All right. And you took none. [305]

A. No, of course not.

Q. Then if you are basing your opinion upon the case history in this girl, you must presume that the iodine test was normal—correct?

A. I only have the report as read by Dr. Melton.

Q. Dr. Melton?

A. But that does not override my findings from a clinical inspection.

Q. In your opinion? A. That's right.

Q. All right, doctor. Your second reason indicating a hypothyroid state, was that the people are underweight. Doctor, in your opinion, is Sandra Nihill underweight?

A. I didn't say that, I said overweight.

Q. Well, doctor, you might have, that's what I was wondering.

A. I said sometimes underweight but as a rule overweight.

Q. All right. Now let's get that straight again now. You say sometimes underweight, but now you say as a rule overweight.

A. I said as a rule they were overweight, I am sure I answered it that way.

Q. All right, and sometimes underweight?

A. Sometimes they can be underweight. So, that you just can't always go upon obesity and thinness [306] in determination for a hypothyroid state.

Q. No. 3, doctor, was that you expect a retarded mental condition. Do you find that in Sandra?

Mr. Packard: Now, I object. That was not the

(Testimony of Dr. Harvey E. Starr.)

testimony "that you expect," he said it's possible. Counsel is misstating the evidence, assuming facts not in evidence and I submit it's misleading, it's misleading the jury, and the doctor, the way these questions are being framed.

The Court: If the doctor noted that as one of the factors, I suppose he would have a right to ask if he found it present here.

A. There certainly was no evidence in Sandra that she was mentally sluggish or mentally inadequate. And when I made that comment, I think the question was asked to what extent hypothyroid conditions could go and I said that a hypothyroid state could of course range from the mild to the severe.

Q. But that is one of the things you look for?

A. In a severe state, certainly we do find it. For that matter you can find mental pictures in the hyperthyroid state too, so if I in any way inferred that we were looking for mental aberrations in Sandra, I certainly am sorry because I certainly wasn't looking for that in Sandra, nor did I anticipate seeing it. To me, she [307] is just a fine girl and I didn't find any of that sort of picture at all.

Q. All right, doctor. I want to know, when we speak of a hypothyroid state, we are speaking of an extreme thyroid state, are we not?

A. No, sir. If you said an extreme thyroid state, would you mean an extreme hypothyroid or would you mean an extreme hyperthyroid state?

Q. Well, doctor, doesn't hypothyroid itself ex-

(Testimony of Dr. Harvey E. Starr.)

press an extreme state and a condition of a thyroid deficiency?

A. No. Many people have a mild degree of hypothyroidism all their life and go through life probably without recognizing that fact.

The Court: Do you use two words there, doctor, one hypo and one hyper?

The Witness: Yes, sir.

The Court: Well, now, which——

The Witness: Hyper is above and hypo below.

The Court: Which would you say is the type that—— [308]

The Witness: In the hair-effected cases you find the hypothyroid, inactive.

Q. (Mr. Lanier, resuming): Inactivity?

A. That's right.

Q. And when you find that case, doctor, to the extent of where it causes loss of hair, it is in an advanced stage, is it not?

A. I wish that our medical experience could be so definitely answered. When we find patients that show a dryness of the skin, that may be only one of the manifestations. Now——

Q. Doctor, could you please just answer my question and answer me if loss of hair itself only appeared——

A. All loss of hair isn't due to hypothyroid states, Mr. Lanier.

Q. But if it can be caused by hypothyroid states, doctor, isn't that an extreme case?

A. No, sir.

(Testimony of Dr. Harvey E. Starr.)

Q. That could be an early stage?

A. It could be moderately mild stage.

Q. Moderately mild? A. Yes.

Q. It would not be early?

A. It could have been manifesting itself, maybe for a few months. These things can't be just tied down,—this is this and this is this, clinically. [369]

Q. That's one of the things I'm trying to point out, doctor. Thank you. Doctor, you have stated to the jury that the causes of alopecia areata are unknown. Basically speaking, that's one of the things, medically, with alopecia areata, is it not?

A. The cause of alopecia areata remains unknown.

Q. Now, however, there is one accepted cause. Is there not?

A. There is one condition on which many dermatologists feel that there is definitely an expression or a factor.

Q. And what is that, doctor?

A. We see so many times, in individuals in which there has been a death in the family or maybe a financial reverse, divorce proceedings, some strong emotional stress, an alopecia areata can manifest itself. Away from that, substantiating—or the feeling that the neurogenic factors are so important in this, of course is the fact that every once in awhile we have very young individuals who have shown alopecia areata manifestations — classical manifestations, so that it would be hard to put them under the neurogenic factor.

(Testimony of Dr. Harvey E. Starr.)

Q. You don't feel that the loss of hair, total loss in a [310] young girl, could ever be put in that category?

A. When I see a patient with alopecia areata, I always inquire into many of the stresses that they may have been going through. I feel they should be considered.

Q. You feel they should be considered?

A. I certainly do.

Q. And there is no question that alopecia areata occurs most often, doctor, in the first and third decades of life, between ten and thirty? A. Yes.

Q. Doctor, you state that you are familiar with Dr. Michelson's deposition? A. Yes, sir.

Q. And did you read the following questions and answers of Dr. Michelson——

Mr. Packard: Just a moment. This isn't in evidence as yet.

Mr. Lanier: If the Court please, he has been examining direct upon Dr. Michelson's deposition.

Mr. Packard: All right. Where are you reading?

Mr. Lanier: Page 14.

The Court: I would think, Mr. Packard, that under the circumstances, [311] that he should be permitted to ask, as long as you stick to the findings rather than to opinion.

Mr. Packard: Where are you reading from?

Mr. Lanier: Page 14.

Mr. Packard: Whereabouts?

Mr. Lanier: About the middle of the page. I can't tell you because these lines aren't numbered.

(Testimony of Dr. Harvey E. Starr.)

Q. Did you or not read the following question and answer:

"Question, by Mr. Packard's office:

"Now I will ask you to state, Doctor, following your examination what conclusion did you make with respect to this young girl?

"Answer: Dr. Mandel, my associate, and I both looked at the child. We examined her and then discussed the case and he and I in particular came to the conclusion that her loss of hair is what is known as alopecia areata."

Did you or not read that question and answer?

A. I did.

Q. Do you or not disagree with Dr. Michelson?

A. The whole deposition of Dr. Michelson has to be read, [312] because he also mentions fragilitis crinium.

Q. That's exactly what he does, doctor; he mentions it only. To say the least of it, doctor, you do not rule out alopecia areata?

A. No, that's one of the conditions that certainly has to be taken under strict consideration.

The Court: Perhaps the jury might withdraw for ten minutes. Court will stand in recess for ten minutes.

(Whereupon, a ten-minute recess was taken, and thereafter the following proceedings were had in open court:)

DR. HARVEY E. STARR

resumed the witness stand for further cross examination, as follows:

Cross Examination

Q. (By Mr. Bradish): Doctor, you indicated to Mr. Lanier, that, I think possibly three weeks to a month ago, you rendered a written report to Mr. Packard based upon your review of the depositions of Drs. Martin, Melton and Michelson, and the pictures that were furnished to you at that time. Is that right? A. That's right. [313]

Q. And in that report to Mr. Packard, doctor, did you give him at that time your opinion as to what condition you felt this girl had?

A. I stated that——

Mr. Lanier: One moment, if the Court please——

The Court: Answer that yes or no.

A. Yes.

Q. And at that time, based upon your review of the depositions, and the pictures that were made available to you, was your opinion based upon reasonable medical certainty? A. Yes, sir.

Q. And at that time, doctor, what was your opinion concerning this young lady's condition?

Mr. Lanier: Objected to, if the Court please, it's not the best evidence. The witness is here, he can testify.

The Court: I think that's a good objection. Something he may have said to Mra. Packard some weeks or months ago, I think would be——

Mr. Bradish: Well, all right; I'll rephrase the question. [314]

(Testimony of Dr. Harvey E. Starr.)

Q. (Mr. Bradish, continuing): Doctor, as of the time that you rendered the report, did you have an opinion based upon reasonable medical certainty as to what the girl's condition was?

A. Yes, sir.

Q. And what was your opinion concerning her condition at that time?

Mr. Lanier: Objected to, if the Court please. It's not the best evidence.

Mr. Bradish: What is the best evidence?

Mr. Packard: May I be heard?

The Court: Yes, you may.

Mr. Packard: He is asking this doctor for a medical opinion—he is a licensed M.D., a specialist in dermatology—as to what his opinion was based upon certain findings. He had pictures which he examined, and he certainly can give his opinion as to what condition, in his opinion, she was suffering from at that time.

The Court: I still sustain the objection on the theory that his [315] opinion now is what we are interested in, not what his opinion was, and what he may have indicated to Mr. Packard couldn't be of any help to this jury; what he testifies now what his opinion is.

Mr. Bradish: All right, your Honor, I think I can rephrase it.

Q. (Mr. Bradish, resuming): Doctor, you gave us an opinion here today based upon your reading of all of the depositions of the three doctors, Doctors Martin, Melton and Michelson, and the pictures that

(Testimony of Dr. Harvey E. Starr.)

you observed, and based also upon your physical examination of this young lady last Tuesday, and I believe you told us that based upon reasonable medical certainty you thought she had a condition known as fragilitis crinium?

A. Fragilitis crinium.

Q. Now, doctor, is that opinion that she has this fragilitis crinium based upon all of your examination, including her physical examination, the same opinion that you had concerning her condition prior to her actual physical examination by you?

Mr. Lanier: Objected to as immaterial, your Honor. Also it's repetition.

The Court: Sustained. [316]

Mr. Bradish: That's all I have.

Redirect Examination

Q. (By Mr. Packard): Dr. Starr, upon your physical examination of Sandra Tuesday, did you find anything from a clinical finding which you were not aware of at the time you read the depositions and examined the pictures which have been marked as Plaintiff's 32 and 33—now did you find anything at the time—do you understand that question—anything at the time of your physical examination that differed with the information you had through the history by reading the depositions and examination of the pictures? A. Yes, sir.

Q. What is that, doctor?

A. There were no smooth non-hairy areas along the ordinary hairy area of the scalp. There was hair growth all over, and——

(Testimony of Dr. Harvey E. Starr.)

The Court: You mean at the physical examination that you made?

The Witness: Yes, sir. [317]

The Court: Proceed.

A. (Continuing) The hair was lighter colored, more of a blonde however than the picture that I had see before. Finding no definitely bald spots, definitely circumscribed bald areas, I felt that my opinion should change from that which I had formed from reading the depositions, from that of an alopecia areata to that of a fragilitis crinium.

Q. And did you find any bald areas upon Sandra when you examined her on Tuesday?

A. No, sir, there was hair growth all over. The only difference is there's difference in the hair length. Some of it is just mere stubble, other hair is getting out there, like at the back of the neck here, a couple of inches long.

Q. And what is one of the findings that you expect—one of the usual, normal findings for alopecia areata, insofar as the condition of the hair upon the scalp?

A. Well, when the hair first comes out of course, in alopecia areata, it comes out as a rule in a definitely circumscribed area, say a coin-sized area in which all the hair in that area is lost. The area is non-inflammatory, it's definitely smooth. After a period of time, hair comes back in that area of alopecia-areata. [318] It may be changed in color for a period of time. In other words, in a case of alopecia areata where there has been a recent regen-

(Testimony of Dr. Harvey E. Starr.)

eration of hair, in the case of a person with dark hair you would expect to find white patches. Now that in time may correct itself. Normal pigmentation may come back too. So, when you are viewing these pictures and giving clinical impressions, they do vary from the time Dr. Martin saw the case to the time Dr. Melton saw the case to the time Dr. Michelson saw the case until Dr. Levitt and myself saw the case.

Mr. Packard: That's all, doctor.

Mr. Lanier: No further questions.

Mr. Packard: You may be excused, Dr. Starr.

(Witness is excused.)

Mr. Packard: Dr. Jeffreys, will you take the stand please. [319]

DR. C. E. P. JEFFREYS

called as a witness on behalf of the defendant, after being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

The Clerk: What is your name please?

The Witness: C. E. P. Jeffreys.

Direct Examination

Q. (By Mr. Packard): Dr. Jeffreys, will you please state your business, profession or occupation, sir?

A. I'm a consulting chemist for the Trusdale Laboratories in Los Angeles.

Q. Do you hold any position there?

A. I'm technical director of the Trusdale Laboratories.

(Testimony of Dr. C. E. P. Jeffreys.)

Q. Will you please state to us what business the Trusdale Laboratories is in?

A. Consulting chemists serving the public, and the problems of analyses, testing, research.

Q. And for what period of time have you been connected with the Trusdale Laboratories, doctor?

A. Twenty-two years.

Q. Will you please state to the jury your educational background and what degrees you hold, sir.

A. I hold a Bachelor's Degree and a Master's Degree in chemistry from the University of Texas, and a PhD degree in chemistry from the California Institute of Technology.

Q. PhD, that's a Doctor's degree from Cal. Tech. —is that correct? A. That's correct.

Q. And have you had any teaching experience, doctor?

A. Yes, I was teaching at the University of Texas and the California Institute.

Q. And what subject did you teach?

A. Chemistry.

Q. And do you belong to any scientific affiliations or societies, and please name them if you do?

A. Yes. I belong to the American Chemical Society; the American Society for Testing Materials; the American Association for the Advancement of Science; American Water Works Association; Paint & Varnish Production Club, and some honorary academic societies.

Q. And, doctor, have you had occasion to write any scientific publications? A. Yes, I have.

(Testimony of Dr. C. E. P. Jeffreys.)

Q. Will you please state what publications you have written or been the author of. [321]

A. I have written research papers and such journals as the Journal of the American Chemical Society; the Journal of Industrial Engineering Chemistry; Science, Food Industries.

Q. Now, could you state to us any commercial enterprises you have been connected with, or projects, or research for——

A. Well I have had four years post-doctor research project work at the California Institute. I formerly was an employee of the DuPont Company; Union Oil Company, and I worked for the City of Pasadena.

Q. Now, doctor, have you had any experience in running controls for the manufacture of cold wave solutions? A. I have.

Q. Will you please state what the ordinary composition—chemical composition—of cold wave solution contains?

A. Cold wave solutions commonly are a solution of a salt of thioglycolate acid, usually the ammonium salt.

Q. And is there any accepted range in connection with the manufacture of cold wave solutions, as to the percentage content of thioglycolate acid?

Mr. Lanier: I now object to this as going beyond the scope of this man's qualifications. He is a chemist, qualified I am sure, to break these down and state what it is. The accepted range of the industry, he is not qualified to do. [322]

(Testimony of Dr. C. E. P. Jeffreys.)

Mr. Packard: I think I qualified—the fact that he has run controls for manufacture of this.

Q. Have you familiarized yourself with the various cold wave solutions placed upon the market?

A. I have.

Q. And have you made analysis of various cold wave solutions that are presently upon the market?

A. Yes.

Q. And have you familiarized yourself by the reading of literature and journals relative to the production of cold wave solutions? A. Yes.

Q. And through your experience in running the controls, the journals you've read and analysis you've conducted, have you on opinion as to the accepted normal range of thioglycolate acid content of cold wave solutions? A. Yes.

Q. And what is it?

Mr. Lanier: Objected to, if the Court please upon the same grounds, for the same reasons as heretofore stated.

The Court: Overruled. He may answer. [323]

A. Cold wave solutions may contain as small an amount as three percent of calculated thioglycolate acid, and as high as ten percent.

Q. And is there any normal range of the common strength range used in the average cold wave solution?

Mr. Lanier: Same objection, your Honor.

The Court: He may answer.

A. Yes.

Q. And what is that, sir?

(Testimony of Dr. C. E. P. Jeffreys.)

A. Of the order of seven percent.

Q. Now, at my request, did you examine and make analysis of a certain cold wave solution known as Cara Nome Pin Wave from a batch No. 181?

A. I did.

Q. What were your findings, insofar as thioglycolate content of the batch 181 of the specific——

A. 6.94 percent of thioglycolate acid.

Q. Now is that within the normal accepted range for the manufacture of cold wave solutions?

A. Yes.

Q. Now, did you further determine what is referred to as is it PH factor—— [324]

A. Yes.

Q. I think I used it as RH—it's the PH factor?

A. Yes, that's right.

Q. And will you please explain to the jury what is meant by the PH factor?

A. PH is a scale of measurement of alkalinity or acidity within numbers one, two, three, on up to seven PH, meaning different degrees of acidity —that is one is very strong acid, seven is neutrality, that's the same as pure distilled water, and from seven up to fourteen on the scale is the alkali scale—seven, eight, nine, on up to fourteen. It's simply a scale of measurement of the acidity or alkalinity of a water solution.

Q. Now did you determine the PH factor in this particular sample which you were provided with?

A. I did.

Q. Batch 181 of Cara Nome? A. Yes.

(Testimony of Dr. C. E. P. Jeffreys.)

Q. And what was the PH factor?

A. Nine point two.

Q. Is that within accepted range for cold wave solution of nine point two? A. It is.

Q. Now, so that the jury understands—I know I have referred to the contents of thioglycolate acid, but is the solution itself an acid or an alkali? [325]

A. It's alkali.

Q. So we understand, when you pass beyond the seven PH factor, you get into an alkali rather than an acid? A. That's correct.

Q. So the actual cold wave solution, as it is placed upon the market, is an alkali rather than an acid?

A. Yes, it's an alkaline solution.

Q. And so really it's more or less a misnomer to refer to it as an acid, is that correct?

A. Well, the actual active ingredient is a salt of thioglycolate acid, it is an ammonium salt, and since thioglycolate acid is a weak acid and ammonia is a stronger base, that salt, in a water solution, will give an alkaline reaction.

Q. Well, are there other types of cosmetics upon the market which contain a larger or a stronger alkaline solution than a cold wave solution?

A. Yes.

Q. And what are those, doctor?

A. Soap will have a Ph of around ten.

Q. So some soaps have a higher or stronger alkaline content than the normal cold wave solution. Is that correct? A. That is correct.

(Testimony of Dr. C. E. P. Jeffreys.)

Q. Now is there such things as hair straighteners? [326] A. Oh, yes.

Q. And what do those contain?

A. Those contain normally caustic alkali, such as sodium or potassium hydroxide, and they are very strong. The Ph of those run up to twelve to fourteen.

The Court: Twelve to fourteen what?

The Witness: On the alkalinity scale, near the maximum.

Q. (Mr. Packard, resuming): Now, doctor, assume a cold wave solution containing approximately seven percent of thioglycolate acid, and a PH factor of nine point two, was applied in the giving of a home cold wave, and assume further that the person receiving the home cold wave did not make any complaint of any sensitivity insofar as the skin area of the scalp was concerned, or any burning sensation, would you have an opinion as to whether there would be any absorption of this chemical product into the system or the blood? A. Yes.

Q. And what is your opinion?

Mr. Lanier: If the Court please, it's objected to; there's obviously no foundation laid. This witness is not qualified, [327] he is getting into medical subjects. He is not a doctor. He can't tell what would absorb into the skin. He is not qualified to answer. He is not a toxicologist, he doesn't know what the absorption abilities of the chemicals are, he is only a chemist. The question is totally without foundation.

(Testimony of Dr. C. E. P. Jeffreys.)

The Court: Well, I would suggest, if you wish to have that question answered, Mr. Packard, that you go further into his qualifications.

Q. Have you written any articles in bio-chemistry? A. Yes.

Q. And what articles have you written?

A. I've written research papers in the Journal of Biological Chemistry.

Q. And have you dealt in any experiments in connection with absorption of chemicals into the skin?

A. Yes. It's part of the chemist's business to know the dangerous properties of chemicals, and we certainly know the chemicals which are dangerous even when breathed, or taken by mouth, or exposed to the skin, that's the business of the chemist.

Q. Have you read papers and journals on that subject of absorption of chemicals through the skin?

A. Yes. [328]

Q. I believe that's sufficient qualification, your Honor.

Mr. Lanier: If the Court please, what can be absorbed through the skin and the scalp, and the results, is a medical opinion for expert testimony and that only, not a chemist. This man is not an M.D.

The Court: Oh, I don't know that the MDs have a corner on the knowledge in those matters. I'll let him answer it.

Q. What is your opinion, doctor?

A. My opinion is that there's very little absorp-

(Testimony of Dr. C. E. P. Jeffreys.)

tion through the skin of any material from an aquatic solution—water solution—there's very little absorption through the skin, of chemicals in general. The material most likely to be absorbed through the skin is oily materials or material contained in oil solutions rather than water solutions.

Q. Now, also, at my request, Dr. Jeffreys, did you have an occasion to make a chemical analysis of a Cara Nome natural curl pin curl permanent wave kit out of Lot No. 278? A. Yes, I did.

Q. Will you please state what your findings were in connection with Lot No. 278?

A. Well—— [329]

Mr. Lanier: May it please the Court——

Mr. Packard: All right, now, if you want to object, I think your grounds are well taken and I would like to withdraw Dr. Jeffreys from the stand for about two minutes to lay the foundation. May I do that, your Honor?

Mr. Lanier: If you will tell me what it is, I might not even object.

Mr. Packard: Well, I will put Mr. Lewis on the stand to testify as to the fact that they haven't changed.

Mr. Lanier: I think maybe you better, counsel, because I don't know what this is for.

Mr. Packard: All right, will you just step down, and Mr. Lewis will you please take the stand.

ARNOLD L. LEWIS

called as a witness on behalf of the defendant, Studio Cosmetics, having been previously sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

Direct Examination

Q. (By Mr. Packard): Mr. Lewis, do you know the approximate date on which [330] batch No. 181 was mixed, compounded or made, the approximate time?

A. Approximately October 22, 1954.

Q. And since that date to the present time, home——

The Court: Excuse me, Mr. Packard, I want to get the reporter to read that question for me again; I didn't follow it somehow.

(The reporter read the pending question.)

The Court: Very well. That was October, when?

The Witness: Approximately October 22nd, 1954.

Q. Since that date, to the present time, have you changed your procedure or your formula in any manner or any wise in the mixing, compounding or making of this particular Cara Nome Natural Curl Pin Curl permanent wave kit? A. No.

Q. It has been the same basic formula, and the same procedure followed? A. Correct.

The Court: I would like to ask a question Mr. Lewis. Do you mean by that that the same contents of all of the different elements in 181 are retained in your present [331] production, and ever since October 1954?

The Witness: In the pin curl permanent.

(Testimony of Arnold L. Lewis.)

The Court: That's what I mean.

The Witness: Each one of them are different.

The Court: I mean the pin curl.

Mr. Packard: The pin curl is the same now as it was at that time, is that correct?

The Witness: Correct.

(Witness is excused and left the witness stand.)

Whereupon,

DR. C. E. P. JEFFREYS

resumed the witness stand for further direct examination as follows:

Mr. Packard: Maybe I should ask one further question for the foundation I overlooked. Could I ask the witness at that position, your Honor? (Counsel was referring to witness Arnold L. Lewis who just left the stand.) [332]

The Court: You may.

Q. (Mr. Packard, addressing Mr. Lewis): Was C.N. 278 compounded, mixed or bottled after 181?

A. 278?

Q. Yes? A. I believe it was, yes.

Q. All right.

The Court: I don't get that question. Will you read that question?

Mr. Packard: I wanted to know whether lot No. 278 was bottled or mixed after 181?

The Court: 278 being what, I don't remember that?

Mr. Packard: The lot number.

(Testimony of Dr. C. E. P. Jeffreys.)

The Court: What lot number?

Mr. Lanier: That's the very part, your Honor, I'm objecting to. I don't know where that came from——

Mr. Packard: This witness made an analysis of it, he testified.

The Court: He examined it? [333]

Mr. Packard: Yes.

The Court: Well, I can see what you're getting at.

Mr. Packard: Yes, he made an analysis of 278.

The Court: I get your point. Proceed.

(Witness Lewis is excused.)

Whereupon, further direct examination of Dr. Jeffreys proceeded as follows:

Q. (By Mr. Packard): Now will you please state what your findings were insofar as 278 was concerned?

Mr. Lanier: Now if the Court please, I object to that on the grounds of materiality. I don't know yet what Lot 278 has to do with this lawsuit.

Mr. Packard: Well there's some claim, your Honor realizes, as to the chemical content and so forth, that it has been changed; there's some inference——

The Court: I understood there would be some question raised here in [334] this case about the amount of this particular acid, whatever you call it —I can't pronounce the big name, but, it had been increased beyond the extent to which Mr. Lewis, or somebody, testified was the normal content of that

(Testimony of Dr. C. E. P. Jeffreys.)

particular solution, and I'm assuming now, that the purpose of this testimony is to show, first, that that particular content then, and still is, it hasn't been changed, and this man has examined one of the similar lots——

Q. Later—a later lot.

The Court: A later lot, but similar in all respects, according to Mr. Lewis' testimony.

Mr. Packard: That's right.

The Court: I'll permit it.

Q. (Mr. Packard, resuming): Will you please state what amount of thioglycolate was present in Lot 278?

A. Six point ninety percent of thioglycolate acid.

Q. And that differed then in four-hundredths of a percent, am I correct? A. That's correct.

Q. In other words that error could have—when I say "error," a difference of four-hundredths of one percent, could have been due to the amount [335] of time it set on the table between the tests. Is that correct? A. That's correct.

The Court: That would indicate a less strength of that particular——

The Witness: Practically identical.

The Court: All right.

Q. And did you determine the PH factor in Lot 278? A. Yes.

Q. And what was that?

A. Nine point O two. (9.02)

Q. And were those findings within the normal

(Testimony of Dr. C. E. P. Jeffreys.)

range of cold wave solutions upon the market at that time? A. Yes.

Q. And also the range of cold wave solutions that were upon the market in February 1955?

A. Yes.

Mr. Packard: You may cross examine.

Cross Examination

Q. (By Mr. Lanier): I just have one or two questions, doctor. I won't keep [336] you long. You have stated that the difference in the range of various home cold wave solutions that you have examined and checked—and I'm sure you have examined and broken down many—run from three percent to ten percent? A. That's correct.

Q. The variation, doctor, from three to ten itself, on the face of it, is some considerable variation, is it not?

A. It is a large variation.

Q. And of course, if we are just looking at it from the effectiveness of the cold wave itself, to do the purpose for which it is sold, that is also quite a spread, isn't it? A. It is.

Q. Now, how do you account for that spread?

A. Well, the cold wave solutions, of course, are intended for different purposes and different types of hair. The stronger solutions are—the very strong solutions are usually professional solutions. The medium range——

Q. Now, what do you mean by "professional solutions"?

(Testimony of Dr. C. E. P. Jeffreys.)

A. Utilized and applied by professional operators.

Q. Beauty operators?

A. Yes. The medium range and low range are home permanent ranges. [337]

Q. So, whenever you speak of ten percent, you are actually speaking of the solution not that is sold in home waves; you are speaking of the solutions that are sold in beauty shops?

A. Most generally used by beauty shops.

Q. Yes. Now then, doctor, let's get back to home waves. What's the average norm in home waves?

A. Around seven percent.

Q. That's maximum?

A. Well that's the common range for the better grade, more effective, cold wave.

Q. Then it goes down to three percent?

A. Some of them for a special purpose use—well special purposes for hair that's been often waved, and hair that is sensitive, and the various factors that enable manufacturers to make a special purpose solution they can sell in those cases.

Q. Umhum. Now, at the time, Dr. Jeffreys, that you broke down batch 181 of Cara Nome Rexall permanent, how did you get it—did you get it in a package or just a bottle, or what?

A. No it came by mail from Mr. Packard's office.

Q. And it had the complete kit, is that it? [338]

A. No, just the bottle.

Q. All you got was the bottle?

(Testimony of Dr. C. E. P. Jeffreys.)

A. Cold wave portion.

Q. Nothing but the bottle?

A. That's correct.

Q. The cold wave portion?

A. Yes, the waving solution.

Q. That's the lotion that actually is the alkali—correct?

A. Yes, that's the waving solution.

Q. And with it, you didn't get the neutralizing compound? A. No.

Q. So you haven't examined the neutralizing compound that came with 181 and have no idea of what its contents are, chemically?

A. Yes, I have a pretty good idea, but I didn't examine it.

Q. You did not examine it? A. No.

Q. Now, is it not true, Dr. Jeffreys,—I've been calling it "thioglycolate" all the time, am I wrong in that?

A. "Thioglycolate"—it's a matter of preference.

Q. In other words, we're not too wrong——

A. That's right.

Q. Well, doctor, is it not—scratch that. I'd like to have you tell me what is keratolytic action? If you know, doctor. [339]

A. It's a medical term, but it means an action of acting upon the protanaceous material, keratin, having certain chemical action on keratin.

Q. In other words, that's a description of a kind of action, is it? A. Yes, chemical action.

The Court: What's keratin?

(Testimony of Dr. C. E. P. Jeffreys.)

The Witness: The tissue of the nails and hair containing protein—keratin.

Q. Then when we speak of the "keratolytic" action of alkaline salts of thioglycolate acid, we are speaking of the result on the hair, aren't we?

A. Yes.

Q. All right. Now, is it not a fact, within your experience, your research and writings, in this matter, Dr. Jeffreys, that thioglycolate is used in tanning processes for the purpose of removing hair from hide?

Mr. Packard: Well, I object, that's immaterial.

Mr. Lanier: It's very material, your Honor.

The Court: Overruled. He may answer. [340]

A. Yes. Certain thioglycolate salts are in certain strengths.

Q. That's correct. Now, then, if the strength, Dr. Jeffreys, becomes too strong, then it would result in the loss of hair, wouldn't it?

A. If it were strong enough and if it were of the proper content. Now ammonium thioglycolate is not used for removing hair from hide. It requires a stronger alkali and a stronger concentration.

Q. Well, doctor, would it be your statement that if it was a hundred percent solution, it would not remove hair from hide?

Mr. Packard: I object. This is immaterial, irrelevant and incompetent. The evidence only shows one strength is used. How can it have any bearing in this lawsuit that 100% was used to remove hair from hide?

(Testimony of Dr. C. E. P. Jeffreys.)

The Court: Oh, I expect he will get back to that pretty soon.

A. I don't think ammonium thioglycolate would be an effective dehairing agent for hide. I don't think it's alkaline enough.

Q. Which one do they use—which one of the thioglycolates?

A. A caustic alkali, salt or thioglycolate or one of the stronger bases. [341]

Q. It's still an alkaline substance?

A. Yes.

Q. It's still a thioglycolate?

A. It would be another salt of thioglycolate acid, but it would be a different chemical compound however.

Q. Now, doctor, one other thing, when you were speaking about the absorption of chemicals through the skin. You, of course, I am sure, don't claim to be a dermatologist, do you? A. No.

Q. Doctor, are you acquainted at all with the composition of hair—hair follicles?

A. No, I am not.

Q. Can you see this, doctor? This is a drawing, an exhibit that's been put up by the defendant. Can you see it? A. Yes.

Q. Theoretically, this is a hair. Now, are you aware of the fact that in order to kill that bulb, to kill individual hairs, that they place a needle right down alongside, running all the way down, without injuring the walls of the side of the hair? Are you aware of that? A. Yes, sir. [342]

(Testimony of Dr. C. E. P. Jeffreys.)

Q. All right. So, there's quite an opening there, isn't there, doctor?

A. It's a pretty fine opening.

Q. You can put a needle down?

A. Yes, you can put a needle down by stretching the hair follicle.

Q. And, therefore, of course, there is no question in your mind but what chemicals could also go down also the same—— A. Yes, indeed.

Q. You doubt that? A. Yes.

Q. If the doctors testify otherwise, you disagree with them?

A. I would. An oily material which is compatible with the oily and sebaceous materials found along hair, yes, to a slight extent, very slight extent.

Q. You disagree with the medical?

A. In that regard, I do.

Mr. Packard: There is no medical here that it can go down through there and that's assuming facts not in evidence.

Mr. Lanier: I am going by the testimony of two doctors who have testified, your Honor, and one in particular. [343]

The Court: That seems to be Mr. Lanier's idea of what it is. Perhaps the jury and you may have a different idea. Anyway, he has disagreed with it, whatever it is.

Mr. Lanier: That's correct, your Honor.

Q. (Mr. Lanier, resuming): Now, Dr. Jeffreys, one other thing. The hair itself—can hair itself absorb chemicals? A. Practically the same.

(Testimony of Dr. C. E. P. Jeffreys.)

Q. Can chemicals run down the hair?

A. No. With a very fine opening of that sort—it's just like the fine capillary, if you put something in a very fine opening, surface tension will carry it, but this is an opening, a very fine opening, which is mostly fatty material which repels water—wouldn't allow the water solution to pass. Just like a drop of water put on a greasy plate won't spread out and run, it will stay in a drop—stay in a drop right at the top and it would be with great difficulty that you could force a water solution down such a very small fatty lying canal.

Q. And your feeling is the same with the hair itself—the hair shaft itself?

A. The hair shaft is a solid. [344]

Q. All right. There's no question, however, Dr. Jeffreys, that you do agree that the skin can absorb chemicals?

A. To a very, very small extent.

Q. To a small degree it can absorb?

A. Chemicals chiefly oily, of an oily nature. That is those compatible with the sebaceous material in the skin can absorb to a small extent. Things from water solution, practically none.

Q. Now what do you mean by "practically none," doctor?

A. Well an insignificant amount for any purposes of toxicities development.

Q. In other words, if ammonium thioglycolate could permeate the skin, it does have a toxic quality? A. I wouldn't say that.

(Testimony of Dr. C. E. P. Jeffreys.)

Q. You don't think it has a toxic quality?

A. Not very strong, no, and the amount that could permeate would be negligible.

Q. I don't mean very strong, doctor. I want to know if it's toxic in proper strength or not, in your opinion?

A. Toxicity—it depends on how it is given. If you drink a bottle of it, it wouldn't be very good for you, but putting it on your skin, no.

Q. And you don't think there is any question but what, [345] nevertheless, for instance, it would be listed with the toxic poisons if you drink it?

A. Not with a highly toxic poison.

Q. But toxic? A. It has some toxicity.

Q. Yes. Inherently dangerous?

Mr. Packard: Well, this calls for a conclusion. We're getting into legal terms now.

The Court: I think so.

Mr. Lanier: That's all I have, your Honor.

The Court: Any further questions?

Mr. Bradish: I have none.

The Court: Thank you very much.

(Witness excused.)

Mr. Packard: The next thing I want to read is this deposition. Maybe we could adjourn and start off with this Monday, your Honor. [346]

The Court: How many pages do you have in the deposition?

Mr. Packard: Well, there's 38 pages, and it will take probably 45 minutes.

The Court: Mr. Lanier, it's suggested here we

might, instead of undertaking to read 38 pages of deposition, we might wait until Monday morning.

Mr. Lanier: It's up to the Court, your Honor. I'm willing to stay until six o'clock or I'm willing to wait until Monday. I'm a long way from home.

The Court: Well, this is Friday afternoon. The jury has got to get home and get ready for the week-end and I suppose it might be an accommodation to the jury to get a little earlier start; I know it would to some of you. Now, be very careful over the week-end, ladies and gentlemen of the jury. The tendency of the juror, being very human, is to go out and tell your friends about the case you are sitting in and get their idea about how many different kinds of permanent wave lotions they have used, and what the effect was, and all that sort of thing. Well that isn't anything that you ought [347] to clutter your mind with at all. It might mislead you, and you've got to base your verdict in this case eventually on nothing else but the evidence in the case, and not what somebody else may have thought they had in the way of an experience, or their judgment on what might be the result of this, or that or the other. Just don't talk about this case to your husband and wife and the children and grandmother and aunts and all those people who might be around your home. Just say "that's behind me until Monday, I've got to wait until I get there Monday and hear this whole story before I can talk about it, then I'll tell you all about it later on." If you will do that please, you will be much better jurors. Now

you may withdraw and be back at ten o'clock Monday morning please.

(Whereupon, the hearing in the above entitled matter was adjourned until ten o'clock a.m., April 14, 1958.) [348]

Be It Remembered, that a further hearing was had in the above-entitled and numbered cause, on its merits, before the Honorable Fred L. Wham, Judge presiding, and a Jury, in the Federal Court Room, Federal Building in the City of Los Angeles, State of California, on April 14, 1958, beginning at the hour of 10:00 o'clock a.m.

There were present, at said time and place, the appearances as heretofore noted.

Whereupon, the following proceedings were had in open Court:

Mr. Packard: May I proceed, your Honor? [1]

The Court: You may proceed.

Mr. Packard: May I have the original deposition of Dr. Henry E. Michelson?

(The Clerk furnished counsel with said deposition.)

Mr. Packard: Your Honor, we don't have a sufficient number of copies of the deposition. Mr. Bradish will read from the original and I will take the stand and read the answers, but we don't have a copy for your Honor.

The Court: I'll listen, Mr. Packard.

Whereupon,

DEPOSITION OF DR. HENRY E. MICHELSON

witness for the defendants, was read in open court, Mr. Bradish reading the questions and Mr. Packard reading the answers, as follows:

Mr. Packard: This deposition is the deposition of Dr. Henry E. Michelson, which was taken on the tenth day of July, 1957, in his office in Minneapolis, Minnesota. Pursuant to stipulation, the deposition was taken on behalf of the defendants, Arnold L. Lewis and also Rexall Drug at that time. Is that sufficient, counsel? [2]

Mr. Lanier: That's sufficient.

Mr. Bradish: May the record show the appearances, Mr. Lanier, of Lanier, Lanier & Knox, Attorneys for the Plaintiff, and Mr. Backer of Reed, Callaway, Kirtland and Packard, Attorneys for the Defendants.

"Q. Will you state your full name, Doctor?

A. Henry E. Michelson.

Q. You are a medical doctor? A. Yes.

Q. Where did you take your training?

A. University of Minnesota.

Mr. Lanier: May the record show that we will admit the qualifications of the doctor, unless counsel wants them in the record for the deposition.

Mr. Backer: I would like them in the record.

Q. When did you graduate? A. 1912.

Q. Have you had any postgraduate work, Doctor, since receiving your degree?

A. Yes, in dermatology at the University of Minnesota and in Europe. [3]

(Deposition of Dr. Henry E. Michelson.)

Q. Where in Europe did you study?

A. Paris, London, Edinburgh, Vienna.

Q. Universities in each of those countries?

A. Yes.

Q. And you specialize in the field of dermatology, do you, Doctor? A. I do.

Q. How long have you specialized?

A. Since 1918.

Q. Since 1918. Where have you practiced this specialty?

A. Entirely in Minneapolis.

Q. Continually in Minneapolis? A. Yes.

Q. Have you ever written any articles in conjunction with your specialty, Doctor?

A. Yes, a great many, about two hundred.

Q. Have you received any honorary degrees in your profession?

A. Well, not degrees, but recognition.

Q. You have received recognition. Where have you received recognition?

A. Oh, I have been president of the American Dermatologists, president of the investigative society, chairman of the American Medical Association [4] Dermatological Department. I have been elected honorary member of a lot of European societies, British, German, Austrian, French, Italian, Swedish, Danish, Venezuelan. Quite a few.

Q. Now, Doctor, I believe you had occasion to examine Sandra Mae Nihill? A. Yes.

Q. When did you examine her?

A. On March 23, 1956.

(Deposition of Dr. Henry E. Michelson.)

Q. Where was the examination made?

A. At this office.

Q. And, for the record, where is your office located?

A. 715 Medical Arts Building, Minneapolis.

The Court: Pardon me. The date of that examination?

Mr. Packard: March 23, 1956.

Q. On the occasion of that examination did you take a history from the young lady? A. I did.

Q. Did anyone accompany her at the time of examination?

A. Yes. Her mother, I believe. Yes, I am sure.

Q. What did that history divulge?

A. May I read it? [5]

Q. Yes. You have the records there that were made at the time?

A. Yes. The history as we noted it was as follows: She was fourteen years of age. She was the fifth of six children. The family were farmers and lived in Kensal, North Dakota. The trouble for which she came had been present thirteen months. The disease, or whatever you want to call it, was confined to the scalp. She had previously been seen by a Dr. Clarence Martin and Dr. Frank Melton of Fargo. Dr. Melton was a skin specialist, so I paid more attention to his information. That was the history. She used a wave solution. She had used wave solutions before. Not the wave solution, but a wave solution. On February 5, 1955, had used Cara Nome home wave kit. They thought the solu-

(Deposition of Dr. Henry E. Michelson.)

tion smelled strong. When applied caused a burning sensation. Two weeks later she noted hair loss in the front area. Then a substantial loss throughout the scalp resulting in complete loss by June of 1955. On examination there were no hair stubs, that is little roots, left. No inflammation. This is what she told me. This isn't what I saw. No hair stubs, no inflammation. Since then slow [6] regrowth of hair reaching about half-inch in length. Her past health was good. Had the usual childhood diseases. Diet was good. She was a large child, weighed about 150 pounds. Menstruation was regular, even at the age of twelve. She had no childhood eczema. The family history: There was no history of anything similar. They did state, though, that she was sensitive to sunlight and she excoriated her skin frequently. That is, scratched often. That's all the history.

Q. Well, now, Doctor, at the time of your examining the child, her hair was growing to some extent, was it?

A. Yes. Here again are the notes. There was short stubble, dark and light color, normal tensile strength. That is, we took out a hair and pulled on it and it didn't break. The entire scalp mildly reddened and had a few scales, like dandruff.

Q. That would be similar to dandruff of the scalp, the redness that you refer to?

A. That's right. And there was loss of eyebrows and eyelashes. That was the extent of that.

Q. You indicated that there was a difference in

(Deposition of Dr. Henry E. Michelson.)

color in the hair that you observed? A. Yes.

Q. Have you any explanation for that? [7]

A. That is a frequent occurrence when hair regrows after loss not to have uniform pigmentation.

Q. Have you ever come in contact with a patient who, as this girl, claims to have lost her hair following use of a permanent wave solution?

A. You mean complete loss?

Q. Yes. A. No, I have not.

Q. You know the ingredients of cold wave solution, do you, Doctor?

A. Well, in a broad way, yes. I had it written down in here. Ammonium thioglycolate.

Q. That is present in all cold wave solutions?

A. I think in most.

Q. Now, from your observation of the history that you received from this girl and her mother, were you able to form any conclusion as to the cause of her loss of hair? A. No, I was not.

Q. Now, without any damaging of the scalp itself, Doctor, following the use of any application on the hair, such as scarring or inflammation of the scalp, are you in a position to express an opinion as to whether or not the solution used would be the cause of the loss of hair? [8]

Mr. Lanier: That's objected to, your Honor, on the ground it is an improper hypothetical question. There is no proper foundation laid.

Mr. Packard: Maybe your Honor would like to read the question?

The Court: No, I think he may answer it.

(Deposition of Dr. Henry E. Michelson.)

A. I will have to qualify the answer. I saw her thirteen months after it happened, so I couldn't.

Q. Well, based on the history that you received from her that there was no scarring or inflammation of the scalp following application of this cold wave solution that she states she used, are you in a position to say whether or not the ingredients of that cold wave solution could have caused the loss of hair.

Mr. Lanier: Same objection, your Honor.

The Court: He may answer.

A. I would have to answer it in this way: That if hair were to be lost from an application or the reaction to an application there would have to be [9] inflammation preceding the loss of hair.

Mr. Lanier: I'll withdraw that objection.

Q. Doctor, in your experience in the field of dermatology, have you come in contact with people who have lost their hair? A. Yes.

Q. What, in your opinion, is the cause of the loss of hair?

Mr. Lanier: If the Court please. That is objected to upon the ground that it is an improper hypothetical question, asked in general of all people, not the application to the particular set of facts in this case.

The Court: He may answer.

A. I would have to answer there are many causes.

Q. Will you relate the causes known to you for the loss of hair?

(Deposition of Dr. Henry E. Michelson.)

A. Well, hair may be lost from an acute disease like influenza. It may be lost from use of an anesthetic. It may be lost due to some toxic drug like thallium. It may be lost by unknown causes known as alopecia areata.

Q. Is that last cause unusual, Doctor? [10]

A. That is the most usual of all those I mentioned, alopecia.

Q. No apparent reason for the loss of hair?

A. That is unknown.

Q. Do persons suffering from allergies lose their hair on occasion, Doctor?

A. No. I would say no. I have seen no loss of hair definitely due to allergy.

Q. Now, you indicated that this girl's eyebrows and eyelashes, she gave a history of them having fallen out? A. That's right.

Q. Had they grown back in when you saw her, Doctor? A. No, they had not.

Q. Now, from your experience, Doctor, are you in a position to say whether or not an application of the ingredients of a cold wave lotion, the ingredient you mentioned a short time ago, I have forgotten the word now——

A. Ammonium thioglycolate.

Q. If that solution were put on the hair would it immediately cause the hair to break or fall out?

Mr. Lanier: Withdraw the objection. [11]

Mr. Packard: Well, there's no answer.

Q. You are familiar with that drug, are you, Doctor? A. The solution, yes.

(Deposition of Dr. Henry E. Michelson.)

Q. The solution? A. In a general way.

Q. What is its reaction to hair and on hair?

A. It softens the hair so that when it is bent it will stay bent. That is about the easiest explanation.

Q. Does the length of time it is left on the hair have a different effect on the hair?

A. Yes. There is a prescribed time for its use.

Q. If it is left beyond that time, what effect does it have on hair, Doctor?

A. Well, just short action, more angling than you want.

Q. Would it cause the hair to break off or fall out?

A. I think it could if left long enough.

Q. Well, now, should it have that effect on hair and cause it to break off or fall out, would the effect be immediate or would it be delayed?

A. Delayed.

Q. For what period of time?

A. Oh, probably quite a long while, at least [12] several days if not longer.

Q. After the application, if it were in such intensity or left on to such an extent as to cause the hair to fall out or break, would it leave any evidence of irritation in the scalp in your opinion?

A. It should, yes.

Q. Following your examination of Miss Nihill and after hearing all the history of her case, did you form any conclusion as to the cause of her losing her hair, Doctor?

(Deposition of Dr. Henry E. Michelson.)

A. Well, after examining her and after reading the reports from Dr. Melton I did.

Q. Did you have a report from her attending physician, Doctor Melton?

A. I have a report from the file.

Q. Do you have that report there?

A. No, I haven't it here. You took it. I think we were asked to read that report.

Q. Doctor, I will show you here a report. Is that the one to which you refer?

A. Yes. I say this is the same.

Q. Now, in that report this is—can you describe this report, Doctor, what's the nature of it?

A. Well, a medical report. Report of an examination of the child. [13]

Q. Now, under present illness this report reads: "In February of 1955 patient had a home permanent. This was made by Cara Nome. It was for pin curls. Following the permanent there was no erythema——

A. That is redness.

Q. "No vesiculas——

A. That is blisters.

Q. "No signs of irritation. But within a week she began to lose hair. There has been no illness in the past year. The hair has always been abundant in their family and there has been no change in her pubic or axillary hair. Patient has been very active all year. There has been no history of being away from home during this past year." Now, with that finding, Doctor, that there was no erythema or no

(Deposition of Dr. Henry E. Michelson.)

vesicula and no signs of irritation, in your opinion would the loss of hair have been caused by the application of any substance that would cause hair to break off or fall out without leaving some trace of erythema or vesicula or signs of irritation?

Mr. Lanier: Withdraw the objection.

Q. Now will you answer the question, Doctor?

A. Well, I have to answer it in this way: That loss of hair from a local application couldn't be brought [14] about without external manifestations and in this instance I would think that would be very unlikely.

Q. Now, if hair on the scalp would fall out due to the application of some substance, would the eyebrows and eyelashes likewise fall out if the same substance were not applied to the eyebrows or eyelashes? A. Positively no.

Q. Did you have any discussion with Miss Nihill with regard to the manner in which the cold wave was applied? A. No, we didn't.

Q. Now, I will ask you to state, Doctor, following your examination what conclusion did you make with respect to this young girl?

Mr. Lanier: Withdraw the objection.

A. Dr. Mandel, my associate, and I both looked at the child. We examined her and then discussed the case and he and I in particular came to the conclusion that her loss of hair is what is known as alopecia areata.

Q. In layman's language that is what, Doctor?

A. That is loss of hair of unknown cause.

(Deposition of Dr. Henry E. Michelson.)

Mr. Bradish: Do you want me to read the cross?

Mr. Lanier: May it please the Court, we would prefer to read our own cross.

The Court: Very well.

(Whereupon, the cross examination of the witness was read, Mr. Lanier reading the questions and Mr. Rourke reading the answers, as follows:)

"By Mr. Lanier:

Q. Doctor, you did not examine Miss Nihill as a patient, did you?

A. Well, no. You mean in the sense that I was going to prescribe for her?

Q. Correct. A. No.

Q. Then following that, as a matter of fact, of course you prescribed no treatment or made no medical services to her or her mother at all?

A. None.

Q. She was not examined by you at her request?

A. No.

Q. Now, you have spoken, Doctor, of ammonium thioglycolate? A. Yes. [16]

Q. As being a component part of most hair waves, which within your own field of knowledge you know that to be the fact?

A. Well, in a limited way, yes.

Q. Not as a chemist, I don't mean that, but because of coming in contact with various skin irritants and what causes them and so forth. Then, also I presume, Doctor, that you also know that in addition to ammonium thioglycolate, that also most

(Deposition of Dr. Henry E. Michelson.)

all these hair wave cold lotions for home use contain potassium bromide?

A. Potassium bromide? I didn't know that.

Q. Well, of course, Doctor, you do know what potassium bromide is? A. Yes.

Q. Well, now, Doctor, you have also testified that ammonium thioglycolate in its effect upon hair makes it softer, more pliable, is that correct?

A. That is my general understanding of it.

Q. And I believe, also, Doctor, that it swells the hair, does it not?

A. I believe so. I am not positive.

Q. Wouldn't that be normally what you would expect was to be one of the results of its application? A. I frankly don't know. [17]

Q. That in itself and standing alone, of course, would not make hair friable so that it would break off, would it? A. I would think not.

Q. In fact, it would do the opposite, wouldn't it?

A. Make it tougher?

Q. Make it softer and more pliable rather than softer and brittle?

A. I have no information on that score. I don't know.

Q. Well, Doctor, do you or not know that when the second solution containing potassium bromide is applied to the cold wave, that it hardens the hair? Would that be a natural result?

A. Well, as I say, I don't know much about the process. I have heard of neutralizer.

Q. Well, that is the neutralizer, Doctor. Then

(Deposition of Dr. Henry E. Michelson.)

you don't know of your own knowledge whether the application of that second chemical would tend to make the hair friable so that it remained hard and in place? A. I do not.

Q. But at least you do know that probably that is the neutralizer? A. Yes. [18]

Q. Doctor, I want to ask you a little bit more about ammonium thioglycolate. As a matter of fact, let's start on its best help effect, if any. Taken internally I believe you as a medical man would state that it was very definitely dangerous and deadly, would it not be?

A. I don't know. I really have no knowledge of it as a chemist.

Q. Then as a matter of fact, Doctor, you don't have any knowledge upon the internal workings of the particular chemical of ammonium thioglycolate?

A. No.

Q. Do you know as to whether or not its seepage through the skin into the pores could cause, for instance, disease of the liver? A. I do not.

Q. Now, Doctor, in the directions, and supposing that the directions point out the care in the event that the original solution should get onto your scalp or your skin, either under the hair or on the forehead or on the side, the directions include the fact that it should be immediately wiped clean with absorbent cotton. [19] Medically, from a dermatologist's standpoint, do you know the reason for that?

A. Your question isn't clear. It can't be kept off the scalp and put on the hair, can it?

(Deposition of Dr. Henry E. Michelson.)

Q. Correct, but nevertheless the directions say careful when reaching the scalp, pad it off with cotton, or on the skin. What is the danger of ammonium thioglycolate being on the skin?

A. Just an irritant, I would think.

Q. Can that go through the pores of the skin?

A. I doubt it.

Q. In other words, it is your feeling that you doubt that it can? A. Yes.

Q. Supposing that in the application of this particular Cara Nome cold wave solution, and presuming that testimony will show that it does contain a certain percentage of ammonium thioglycolate, you have no opinion as to its effect should it seep down through the pores of the scalp?

A. Well, I have an opinion that nothing can seep down through the pores of the scalp. The scalp is impervious to solution.

Q. Then, Doctor, right there may I ask you first of all would you, for the benefit of the jury, would [20] you give us the composition of a hair, its subscalp growth as it comes to the scalp and enters, then comes out as the hair we see. Would you just briefly tell us that, please?

A. Mean the chemical composition?

Q. No, the physical makeup of the cells and hair itself?

A. Well, the hair is a cylindrical shaft which is attached to the scalp itself by way of an anatomical papilla. That is what the layman calls a root. The

(Deposition of Dr. Henry E. Michelson.)

hair comes up through that opening and emerges out of the opening.

Q. It comes through the opening of what?

A. Of the skin of the scalp.

Q. Now, when you are referring to scalp in the question I previously asked you, Doctor, what is your definition of the scalp?

A. Definition of the scalp? The scalp is an anatomical portion of the integument of the body, hairy portion on the head. The scalp is definitely referred to as an integument of the head and bears hair.

Q. In the layman's language, is that the skin of the head or not?

A. It is the entire skin. [21]

Q. The entire skin? A. Yes.

Q. Now, is it that skin, Doctor, you are stating that you doubt a chemical could seep into that skin?

A. You mean seep in in the sense of being absorbed systemically?

Q. Yes? A. I doubt it very much.

Q. Could it seep into the skin of the scalp sufficiently so as to damage the hair underneath the skin?

A. You mean the portion of hair under the skin?

Q. Correct.

A. It is possible, but very unlikely.

Q. Could it not soak into the hair and go down below the scalp line, skin line?

A. I don't think so.

Q. By following the course of the hair itself?

(Deposition of Dr. Henry E. Michelson.)

A. Well, the entire thickness is less than a sheet of paper, almost.

Q. Well, if that were true, Doctor, it would be very impossible for you to have a medical history of liver trouble caused by external application of solutions bearing ammonium [22] thioglycolate?

A. I am not a taxicologist. I don't know.

Q. Now, Doctor, of course you are not testifying from either your knowledge from examination or from any case history given you that there was no skin irritation, no inflammation, no scalp erosion, or anything of that kind for a matter of several weeks after the application, are you?

A. Your question isn't very clear.

Q. Maybe I had better reframe it. Your examination was made thirteen months after the application? A. That's right.

Q. According to your history. So you, of course, would not know from your personal knowledge whether or not there was any scalp irritation, whether or not any inflammation, if there was a pus condition or this scratching or whatever there was?

A. That's right.

Q. Now, Dr. Melton reported his examination was also made many weeks after the application so any information you have gotten from him [23] you would not expect to learn that, would you?

A. No.

Q. Do you at present have any information at all from her local doctor prior going to the specialist, Dr. Melton at Fargo?

(Deposition of Dr. Henry E. Michelson.)

A. No, I have none.

Q. Doctor, you know Dr. Melton, do you not?

A. Yes.

Q. Who is now practicing as a skin specialist in Fargo, North Dakota, with the Dakota Clinic?

A. Yes.

Q. Do you know him by reputation?

A. Yes.

Q. Do you know him to be a fine skin specialist?

A. Yes.

Q. And you have confidence in his ability and his opinions? A. I have.

Q. Doctor, is there not at each shaft of hair a depression, from which it grows that you doctors call a follicle?

A. Follicle. Follicle is the hair follicle consisting of hair, shaft of hair, root of hair, and gland that is attached to it, that is to the sebaceous gland. [24]

Q. Now, is it also your opinion that no solution of ammonium thioglycolate could get into the gland of hair through the shaft of hair and follicle itself?

A. A little might get around the shaft, but that's all.

Q. Then if that were true, the degree of harm of permanent nature that it might do would be based, I suppose, upon something which you don't now know, the strength of the solution?

A. I can't answer that.

Q. In other words, Doctor, you wouldn't answer it without knowing the strength of the solution and possible damage?

(Deposition of Dr. Henry E. Michelson.)

A. I don't know anything about the strength of the solution used in hair waves.

Q. In other words, you would have to have a more chemical knowledge of the possible damage that ammonium thioglycolate itself could cause?

A. Yes.

Q. Now, Doctor, in your experience you have seen cases before, have you not, where there has been a temporary loss of hair by the application of cold wave solution? [25]

A. You mean temporary total loss or temporary spot loss?

Q. Well, temporary spot loss?

A. Well, I personally have not seen loss. I have seen hairs damaged, but no complete loss.

Q. In other words, you have seen hair damage caused by the application of home permanent wave solution? A. Yes.

Q. In your own personal experience, you have not run into any permanent loss?

A. Or any loss. Just the hair itself would be in the cases I see and not the scalp.

Q. Where the hair itself due to friability broke off?

A. Not brittle. Broke off at the scalp line, but not in the scalp itself.

Q. You have not personally experienced in any patients a scalp damage from such application?

A. No, I have not.

Q. Have you, Doctor, in your own experience ever had occasion to treat any type of hair or scalp

(Deposition of Dr. Henry E. Michelson.)

injury caused by home cold wave, permanent wave application, by either under violet cold [26] quartz or superficial x-ray therapy?

A. No, I have not.

Q. Have you had any occasion, Doctor, to treat hands and other skin parts of persons who have developed a dermatitis due to the handling of home permanent waves? A. Yes, I have.

Q. Now, would you tell me how that damage and dermatitis is caused?

A. How that damage and dermatitis is caused?

Q. Yes?

A. Well, in your question you state that they had dermatitis due to that permanent solution.

Q. But I mean medically, Doctor, what is the cause in that solution or has caused the dermatitis?

A. I don't know.

Q. But you do know that the skin has been diseased due to the contact with some solution in the home wave?

A. No, we have to put it another way than that. I have seen dermatitis of the hands in hairdressers who use permanent waves but other things, too.

Q. So we do know that it can damage the skin?

A. No. We do know that hairdressers have their skins damaged. I would have to put it that way. [27]

Q. Now, Doctor, from either your examination of the plaintiff child in this case or from any case history which has been submitted to you, subjectively, either by her or by Doctor Melton, have you found any subjective findings to indicate loss of

(Deposition of Dr. Henry E. Michelson.)

hair, which you have described as alopecia areata, in her history or background?

A. Do you mean how would I substantiate that diagnosis?

Q. No. I presume that was visibly. But in her case history anything about family history or background to indicate the susceptibility or likelihood of her having the condition which you have described as alopecia areata?

A. It is hard to answer the way you put it. There is nothing in family history that predisposes one to alopecia areata. Do you mean is there anything in her history that leads me to believe she had it?

Q. That she would anticipate she might?

A. There is no way of anticipating alopecia areata.

Q. You don't feel, Doctor, that has a tendency in families? A. No. [28]

Q. And you don't so find it?

A. It has occasionally been found, but extremely rare, extremely rare.

Q. Was there anything at all, Doctor, about your examination objectively of her skin which would indicate any allergy of any kind or anything unusual in her skin?

A. Yes. In that she had many scratch marks on her arms and on her back and that her mother said she scratches continually and often.

Q. Did you take any skin patch, Doctor?

A. No.

(Deposition of Dr. Henry E. Michelson.)

Q. So from a skin patch you yourself have no opinion to give as to the normality or abnormality of the skin?

A. No. Patch tests don't prove that. I don't know what you mean exactly.

Q. If any patch tests were taken by Dr. Melton, would you be inclined to have confidence in the conclusion he drew from the patch tests?

A. You mean to prove that some substance was causing it?

Q. No.

A. That is what patch tests are used for. [29]

Q. Would you have confidence in the result of his patch tests? A. If he made any.

Q. And his conclusion. Outside of what you call a scratching and the apparent scratching, either by the child herself or someone else, did you note anything else physically and objectively abnormal about her skin? A. No.

Q. Do you have an opinion, Doctor, based upon your examination as to whether or not this condition with her hair and scalp is permanent?

A. Well, yes. It is not permanent because hair had already grown back in when we saw her.

Q. Then it is your opinion that it is not permanent? A. Well, yes, it is my opinion.

Mr. Lanier: Plaintiff's Exhibits A and B are marked for identification. For the record, your Honor, that is Exhibits of the girl without hair. Now, I don't recall right now what numbers they are now. What are those numbers Mr. Clerk please.

(Deposition of Dr. Henry E. Michelson.)

The Clerk: 32 and 33. [30]

Mr. Lanier: A and B when we refer to them are 32 and 33, in this record, your Honor.

Q. Doctor, I show you two photographs which have been marked Plaintiff's Exhibit A, or 32, and Plaintiff's Exhibit B, or 33, which purport to have been taken both on May 26, 1956, that being, I believe, a year and three months after your examination of this girl?

A. I saw her March 23, 1956.

Q. You saw her what date?

A. March 23, 1956.

Q. That was thirteen months after injury?

A. Yes.

Q. Taken two months after you saw her. Would you tell me by looking at Exhibits A and B whether or not that hair and scalp appear to you to the best of your recollection approximately as it was at the time you examined her?

A. Well, I frankly can't make the comparison.

Q. You don't remember, is that it?

A. Yes, I couldn't possibly.

Q. Do you recall, Doctor, whether or not the hair you refer to as having found on her head was full growth?

A. We call it stubble growth. [31]

Q. Now, then, Doctor, if testimony should disclose and the witness herself visually should demonstrate by her appearance in Court at this date, or at the date that it comes to trial in Los Angeles later,

(Deposition of Dr. Henry E. Michelson.)

that she still is essentially or approximately in that condition, would your opinion change?

A. About what?

Q. As to its permanence?

A. No, it wouldn't change.

Q. Even though that condition remains as you see it in Exhibits A and B two years after the application and falling out of hair?

A. I have seen hair return in five or six years later, so we never make a statement it is permanent.

Q. Now, Doctor, in your experience how often have you seen hair return five years later?

A. Well, it is an impossible percentage to quote. I don't know.

Q. If it has not returned for two years, basing your opinion upon reasonable medical certainty, isn't the percentage much, much greater that it will will not return than that it will? [32]

A. I can't state that.

Q. Well, normally, doctor, from your experience?

A. There is no normal to such cases. It is not the best line to go from.

Q. When hair has not regrown for a period of two years in a situation such as you see in Exhibits A and B, and such as now exists in the plaintiff herself, you feel that within reasonable medical certainty you can't even tell me what the percentage chance is? A. I can't.

Q. Doctor, answer this. After two years without

(Deposition of Dr. Henry E. Michelson.)

any regrowth, has it not been your experience that it is more apt not to regrow than it is?

A. I said I just can't make a statement. That may or may not come back. No one knows.

Q. Then you definitely wouldn't say that it is not permanent?

A. I wouldn't say at all. I just refuse to say.

Q. Now, Doctor, you also were asked whether or not normally, when you found this loss of hair, which, as counsel asked you, it were caused by a solution, would you normally expect also the eyebrows and eyelashes to also have disappeared, [33] to which you answered no. But now, Doctor, if again I told you that the directions stated that in the first instance in dampening the curl they use one-half of the solution and after the curl had set for the prescribed time they took the other half of the bottle and poured it on your head, catching the residue in a bowl, we know of course it is going to drip over the lashes and eyebrows, would your opinion be the same if that is true?

Mr. Packard: There is an objection there that there is nothing conclusively proved that it would necessarily drip over the eyebrows or eyelashes.

The Court: Do you want a ruling on that Mr. Packard?

Mr. Packard: Yes.

The Court: Objection is overruled.

A. That is a hard question to answer.

Q. Well, Doctor, at least if the same solution had caused damage to the hair and the same solution at

(Deposition of Dr. Henry E. Michelson.)

the same time did get on the eyebrows and eyelashes, [34] it could cause the same damage to them that it did to the hair, could it not?

A. We will put it this way: When you have total loss of eyebrows and total loss of eyelashes, I can't conceive of the solution hitting each and every one of the eyebrows and each and every one of the eyelashes; whereas you rub it into the scalp, you could picture it getting to each hair, but I can't understand how each and every eyelash would be affected.

Q. But at least would change your opinion if it poured down the forehead and over the lashes and brows?

A. No, it wouldn't change mine.

Q. In other words, you don't think that would happen, Doctor?

A. I don't think so. It would burn the eye itself then and be much trouble.

Q. Doctor, in the layman's language just what is alopecia? Isn't that baldness?

A. No. It is sudden loss of hair with complete loss in several areas or complete.

Q. What do you call a young man twenty-four or five who in a comparatively short time loses his hair and becomes bald? [35]

A. Call that praesenilis alopecia.

Q. What do you call it normally in one of us who has reached age forty or forty-five and starts going bald and does go completely bald?

A. You mean completely?

Q. Even partially like myself.

(Deposition of Dr. Henry E. Michelson.)

A. You would call it the normal course of events.

Q. Would you define exactly for us, Doctor, alopecia areata?

A. As I just defined it, it is a sudden loss of hair leaving areas completely devoid of hair and no damage visible to the external scalp and most always the hair returns.

Q. Do we normally find alopecia in a child of twelve, thirteen, or fourteen years of age?

A. Well, no disease is normal. No, don't normally find it, but it is common in children.

Q. It is common in children of that age?

A. Yes.

Q. In what age is it most common?

A. Well, it is a disease that goes from early, even from birth, up to death. I don't know. I mean the entire gamut of age.

Q. Doctor, I am now referring to a letter written [36] by you April 14 to James, Jungroth, Mackenzie and Jungroth, attorneys at law of Jamestown, North Dakota. Referring to paragraph four of that letter at the bottom of the first page you state: "The entire scalp was mildly reddened with granular scales." Would you explain that for us, please?

A. Well, you might for a layman's point of view, like dandruff.

Q. Well, how about the scalp being reddened?

A. Irritated looking, yes.

Q. In other words, you did find the scalp reddened, irritating looking, and granular?

A. But you notice we said mildly.

(Deposition of Dr. Henry E. Michelson.)

Q. Now, when you state also in that letter there was evidence on the upper back and shoulder of previous excoriation, you mean previous scratchings, that is what that is, isn't it?

A. That's right.

Q. Doctor, would you define for me seborrheic dermatitis?

A. It is a very broad term used to indicate any permanent inflammation on those areas that have sebaceous glands. [37]

Q. Then you do find inflammation of sebaceous glands in that type of seborrheic dermatitis?

A. It is presumed, yes.

Q. In the examination of this girl?

A. It is a very broad term. Yes, we found some mild. I might add it is a very common condition that people aren't even aware of.

Q. Now, you also stated in that letter, Doctor, that the first condition, that is "fragilitis crinium" describes friable hairs resulting from some chemical interference with the normal physical structure of the hair. A. Yes.

Q. Then it was your opinion and must be now that there was chemical interference with the normal physical structure of the hair?

A. At the time we saw her, her hair wasn't normal in appearance. That is what that means.

Q. And you did state then that it resulted from chemical interference with the normal structure?

A. No, I didn't say it resulted from it. The chem-

(Deposition of Dr. Henry E. Michelson.)

ical may be a physiological chemical, her own oil may be causing it.

Q. Correct, Doctor, but you did not ascertain for [38] sure one way or the other whether it was her oil? A. No.

Q. All you knew was it was chemical interference, whether or not from her body or from some outside source? A. We infer that, yes.

Q. Did you find at all, Doctor, any fungi growth at all that could have caused this loss of hair?

A. We didn't make any cultures. Dr. Melton had.

Q. Did you find any thyroid condition at all that could have caused this loss of hair?

A. We didn't examine her for thyroid.

Q. And you found no burns, abrasions, or anything of that type? A. No.

Mr. Lanier: That's all, Doctor.

Mr. Lanier:

Redirect Examination

Q. (By Mr. Backer): You stated that you have treated beauty parlor operators who have been suffering from conditions on their hands due to the use of hair wave lotions or other ingredients? [39]

A. I have, yes.

Q. How would you describe that condition?

A. Well, we call it an occupational dermatitis, something we see in barbers and hairdressers.

Q. Have you ever found one suffering from that condition received it solely from the use of cold wave solution?

(Deposition of Dr. Henry E. Michelson.)

A. Well, no. I couldn't put it that way, because they do so many things.

Q. They handle many solutions?

A. That's right.

Q. Many of which have chemical contents in them? A. That's right.

Q. Now, with regard to this Sandra Nihill and your findings, your diagnosis was that she was suffering from fragilitis? A. Friable hair.

Q. And mild?

A. Seborrheic dermatitis.

Q. Does that condition ever exist in people who suffer from an allergy?

A. Well, we don't call it an allergic disease, no.

Q. But do people who have suffered from allergies have that condition? [40]

A. Well, it is so far apart I can't state.

Q. Well, isn't it true, Doctor, that frequently you will have a patient who uses a product in common usage who gets some abnormal reaction?

A. Oh, yes, indeed.

Q. Is that an uncommon situation?

A. It is very common.

Q. Some people develop irritation to their skin caused by sun, do they not, Doctor?

A. They do.

Q. And some from eating eggs or drinking milk?

A. That's right.

Q. And different foods cause different irritations of the skin? A. Yes.

Q. As a matter of fact, most every substance in

(Deposition of Dr. Henry E. Michelson.)

use you will find certain people who are allergic to that condition, do you not, Doctor?

A. Or sensitive, yes.

Mr. Backer: That's all.

Recross Examination

Q. (By Mr. Lanier): Just one thing, Doctor. In your experience have [41] you had housewives or individuals other than beauticians whom you have treated, whose case history has indicated cold wave solution has caused dermatitis on their hands or skin?

A. I think I probably have. It is very rare.

Mr. Lanier: That's all."

Mr. Bradish: May we approach the bench, your Honor?

The Court: You may.

(Whereupon, counsel for the respective parties and the reporter approached the bench, and the following proceedings were had, out of the hearing of the Jury:)

Mr. Bradish: Friday, I gave your Honor a photostatic copy of the agreement——

The Court: It's laying on the desk in the other room. I'll get it for you. The jury may withdraw and be absent from the room a little while anyway. [42]

(Whereupon, a short recess was taken, after which the following proceedings were had in open court:)

Mr. Bradish: May I proceed, your Honor?

The Court: You may proceed.

Mr. Bradish: Mr. Stark will you step forward.

THOMAS HENRY STARK

having been previously sworn, testified as follows, on behalf of defendant Rexall Drug Company:

Direct Examination

Q. (By Mr. Bradish): Mr. Stark — May I approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Bradish, resuming): I show you a photostatic copy here of an agreement, counsel has stipulated he has seen the original, and that the photostatic copy is an exact copy of the original, and for foundation purposes [43] may be used with the same force and effect as if the original were put in evidence.

Mr. Lanier: It is so agreed.

The Court: Very well.

The Clerk: Do you want this marked, counsel?

Mr. Bradish: Yes. I think I better.

The Clerk: Defendant's Exhibit B marked for identification.

(Thereupon, the document referred to was marked for identification, Defendant's Exhibit B.)

Q. (By Mr. Bradish, resuming): Now, Mr. Stark, I show you defendant's Exhibit B, and ask you what that is, if you know?

A. Well, it's an agreement between the Rexall Drug Company and the druggist in Kensal, North Dakota, a Mr. Olig.

(Testimony of Thomas Henry Stark.)

Q. All right, sir. And was this agreement in effect, if you know, on February 5, 1955?

A. Yes, it was. [44]

Q. All right, sir.

Mr. Bradish: I offer this then, if I might, as Defendant's Exhibit B, your Honor, in evidence.

Mr. Lanier: We have no objection, your Honor.

The Court: Admitted.

The Clerk: Defendant's exhibit B admitted.

(Thereupon, Defendant's Exhibit B, previously marked for identification, was received in evidence and made a part of this record.)

Q. (By Mr. Bradish, resuming): Now, Mr. Stark, in your capacity as manager of the claim department of the Rexall Drug Company, do any claims made by anyone resulting from the use of any of your products come through your department? A. Yes.

Q. And, at my request, Mr. Stark, did you make an inspection of any claims that came through your department resulting from the use of any Cara Nome products following [45] February 5, 1955? A. I did.

Q. And in your inspection of those claims which were made based upon the use of any of the Cara Nome products subsequent to February 5, 1955, did you have any claim made by a person by the name of Mrs. Carl Carlson? A. No.

Q. Did you have any claim made by a person by the name of Mrs. Donald Carlson? A. No.

Q. All right, sir. In your experience as man-

(Testimony of Thomas Henry Stark.)

ager of the Claims Section of the Rexall Drug Company, other than this particular case that we are concerned with here, of Sandra Mae Nihill, have you had any other claims made to your company in which claim was made for complete loss of hair?

A. No.

Q. From the use of any Cara Nome set?

A. No.

Mr. Bradish: Thank you.

Mr. Packard: I don't have any questions, your Honor. [46]

The Court: Cross?

Cross Examination

Q. (By Mr. Lanier): Mr. Stark, you have just answered that you had no claim February 5, 1955, nor since, for the complete loss of hair?

A. No.

Q. Have you checked to see how many claims you had for damage to hair?

A. I did, Mr. Lanier. We have had—we average approximately eight claims a year.

Q. Eight claims a year?

A. Thank you.

Mr. Packard: Just one question.

Recross Examination

Q. (By Mr. Packard): Those claims have all been for breakage of the hair due to the use of a home permanent, or some type of cold [47] wave solution? A. That is correct.

(Testimony of Thomas Henry Stark.)

Q. Have any of those claims ever resulted in a claim for total, permanent, loss of hair, complete loss of hair? A. No.

Mr. Bradish: May I ask just one question?

The Court: Let me ask him one question before we go further.

Questions by The Court:

Q. Speaking of the eight claims, do you refer to the particular 181 lot here or to all claims together growing out of all Cara Nome preparations?

A. Out of all Cara Nome preparations.

Redirect Examination

Q. (By Mr. Bradish): When you say all Cara Nome preparations, how many different Cara Nome preparations do you handle?

A. Seven or eight.

Q. And insofar as those Cara Nome wave sets of the varying varieties are concerned, approximately how many Cara Nome [48] wave sets were handled by Rexall in the year of 1955?

A. To the best of my knowledge, I would estimate approximately four hundred thousand.

Mr. Bradish: Thank you.

Recross Examination

Q. (By Mr. Packard): You refer to approximately eight claims from Cara Nome products. There are other products under the name of Cara Nome than the home permanent, isn't that correct, sir? A. Yes.

Q. And the home permanents or cold waves are

(Testimony of Thomas Henry Stark.)

the only products which Mr. Lewis supplies to you, isn't that correct?

A. I believe Mr. Lewis supplies a hair rinse, or dye, to us as well.

Q. Could you name a couple of the other products——

A. Well, we make Cara Nome lip-stick, Cara Nome deodorant and Cara Nome facial cream.

Q. I notice on one of these "Anapac." Is that a Cara [49] Nome product?

A. Not to my knowledge.

Mr. Packard: That's all the questions.

Recross Examination

Q. (By Mr. Lanier): Mr. Stark, I just want to get one thing clear, which is a little confused in my mind and probably the minds of the jury. When I asked you the question, I asked you about Cara Nome wave solution. Now when you say about eight a year, are you speaking about Cara Nome wave solution? A. Yes, sir.

Q. In other words, that's not all Cara Nome products. You're talking about it averages about eight on the home wave solution? A. Yes.

Q. Did you make a check for complaints from batch 181? A. No, sir.

Q. So you don't know how many claims are against batch 181? [50]

A. The maximum, taking an average of approximately eight a year, Mr. Lanier, the maximum that could come from 181 would be eight.

(Testimony of Thomas Henry Stark.)

Q. All right, but you didn't check?

A. I checked every claim against a Cara Nome permanent of any type.

Q. So the maximum on any one year against batch 181 would be eight?

A. Well, we don't check them by batch numbers, Mr. Lanier. The batch number is unknown to us unless a question might arise, and the batch number would be stated on it. The approximate eight claims a year on Cara Nome permanents consists of all batches——

Q. Of Cara Nome home wave? A. Right.

Q. Of course a particular batch covers a particular period of time, does it not?

A. Not necessarily. Some of our outlets might have the stock on their shelves for sometime.

Q. How many batches a year, for instance, are put on the market?

A. That I couldn't answer, Mr. Lanier. We purchase it [51] under a purchase order, and I am not in the purchasing department.

Q. You actually are not qualified to answer that?

A. No. I have been informed by our merchandising department that we sell approximately four hundred thousand Cara Nome permanent kits every year.

Q. So as a matter of fact, you even get that information from somebody else?

A. Correct.

Q. And you don't know how many of four hundred thousand would be one batch or if it would be

(Testimony of Thomas Henry Stark.)

two batches and so forth? A. Correct.

Mr. Lanier: Thank you.

(Witness is excused.)

Mr. Packard: Mr. Lanier, I want to read the deposition of Gerald L. D'Amour.

Mr. Lanier: When was that taken? [52]

Mr. Packard: You were there; you asked some questions. In Jamestown, August first, the same time all the rest of them.

Mr. Lanier: That slipped my mind too.

Mr. Packard: D'Amour.

Mr. Lanier: Is that on the end of anyone else's deposition?

Oh, I remember it now. I remember that. Yes, I remember that now.

Mr. Packard: Let the record show that this deposition is the deposition of Gerard L. D'Amour, taken in Jamestown, North Dakota, August 1, 1957; that representing the plaintiff was Mr. Lanier and for the defendants was a Mr. Jungroth.

Whereupon,

DEPOSITION OF GERARD L. D'AMOUR

witness for the defendants, was read, Mr. Bradish reading the questions and Mr. Packard reading the answers, as follows: [53]

"Direct Examination

Q. (By Mr. Jungroth): Would you state your name, please? A. Gerard L. D'Amour.

Q. How old are you, Mr. D'Amour?

(Deposition of Gerard L. D'Amour.)

A. Thirty-two.

Q. What do you do?

A. I am a court reporter.

Q. Are you a court reporter for any judicial district in North Dakota? A. Fourth.

Q. For whom do you work?

A. Judge Harry E. Rittgers.

Q. Do you do any free lance work besides working for the judge? A. Yes.

Q. How long have you been a court reporter?

A. Almost ten years.

Q. Where did you go to school?

A. Chicago.

Q. Where was the first job you took reporting?

A. Chicago.

Q. For whom did you work there?

A. For a free lance reporter.

Q. And where did you go from there?

A. Jamestown, North Dakota.

Q. Now, Mr. D'Amour, at my instance and request, on the 3rd of February, 1956, do you recall accompanying me in my automobile to the home of Mrs. William Briss in the vicinity of Kensal, North Dakota? A. Yes, sir.

Q. While we were there do you recall that I contacted an individual named Mrs. William Briss?

A. Yes, sir.

Q. While there do you recall whether or not I visited with this individual with reference to a home permanent given to an individual named Sandra Mae Nihill? A. Yes, sir.

(Deposition of Gerard L. D'Amour.)

Q. With reference to my visit, did I instruct you to write down all questions propounded by me to Mrs. William Briss, and all answers given by Mrs. William Briss in response to questions asked by me? [55] A. Yes.

Q. Did you do that? A. Yes, sir.

Q. In the course of the questions that I asked Mrs. William Briss, do you recall checking your shorthand notes which you have with you whether or not I asked her whether any permanent wave solution of the permanent wave given to Sandra Mae Nihill on or about the 5th day of February 1955 was allowed to get into the eyebrows or forehead of the said Sandra Mae Nihill?

Mr. Lanier: I would imagine that there would be an objection there.

Mr. Packard: You imagine right. You did object.

Mr. Lanier: Yes. If the court please, that is objected to upon the grounds it calls for secondary testimony; it calls for a hearsay answer, no opportunity of cross-examination, and not the proper method of impeachment. It should have been done with the witness on the stand.

Mr. Packard: That's the reason we took the deposition, the witness isn't here. [56]

Mr. Lanier: If the court please, the witness was there and Mr. Jungroth was there at the time Mrs. Briss' deposition was taken.

Mr. Packard: Well, this is for impeachment.

Mr. Lanier: The proper method of impeachment

is to ask the witness himself whether this question was asked and that answer was given.

The Court: That's true. Objection sustained.

Mr. Packard: All right. Very well. That will be all.

Mr. Packard: Call Mr. Lewis, please.

Whereupon,

ARNOLD L. LEWIS

called on behalf of the defendant Studio Cosmetics, having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Packard): Mr. Lewis, what is your present business or occupation, [57] sir?

A. Present occupation?

Q. Yes.

A. I'm a manufacturer of cosmetics.

Q. And for what period of time have you been a manufacturer of cosmetics?

A. Since about 1936.

Q. And, prior to that time, before 1936, what was your business or occupation?

A. I was in the beauty supply business.

Q. And when did you first go into the beauty supply business? A. About 1929.

Q. Are you a member of any cosmetic association?

A. Yes, I'm a member of the California Cosmetic Association, and by virtue of that membership I'm a member of the National Association.

(Testimony of Arnold L. Lewis.)

Q. And have you held any offices in any of those organizations?

A. I was President of the California Association in 1948 and again in 1953.

Q. And, in connection with these associations, do you [58] receive bulletins or journals.

A. Yes, the National Association which is located in Washington, D. C., issues bulletins regularly several times a week to all of their members disclosing various happenings in the industry, together with certain rulings which may come up from the Federal Trades Commission and the Federal Food & Drug Administration.

Q. Now, in connection with your business, sir, do you manufacture cold wave solutions?

A. Yes, we do.

Q. And when did these cold wave solutions first go on the market?

A. To the best of my recollection, they first appeared on the market in 1941.

Q. And have you familiarized yourself with the cold wave solutions put on the market by other manufacturers, other than yourself? A. Yes.

Q. And what is "thio"—is that what they refer to it in the trade? A. Yes, sir.

Q. Is "thio" contained basically as one of the ingredients in all of these cold wave solutions?

A. It is the basic ingredient in every cold wave solution on the market today.

Q. And I believe the evidence here has been that "thio", refers to thioglycolate acid, or the base

(Testimony of Arnold L. Lewis.)

that they convert into an alkali. Is that correct, sir?

A. Well, it becomes an alkali in the solution when it is prepared.

Q. Now, when did you first start manufacturing Cara Nome home kits?

A. I think it must have been about 1948 or '49, somewheres along there.

Q. And in connection with the preparation of these home kits, do you work under any type of a franchise agreement with anyone for the use of any patents and formulas?

A. Yes, we operate under the—a license agreement under the McDonald Patent relating to the use of thio in cold waving.

Q. And to your knowledge, are there any other manufacturers of cold wave solutions that work under the same licensing agreement with——

A. Yes. Several of the other large manufacturers in the country operate under the same license agreement. [60]

Q. In connection with this license agreement, are you furnished with the formula to be used in this particular solution? A. Yes, sir.

Q. Do you pay a franchise for the use of that formula? A. Yes, sir.

Q. And how many different type of cold wave home kit preparations do you presently place upon the market for Cara Nome?

A. For Cara Nome, we have about five different packages.

(Testimony of Arnold L. Lewis.)

Q. And are those different—will you please state what they are?

A. Well, they are intended for different types and textures of hair. The gentle being one type, the regular being for normal hair—I meant to say the gentle being for dyed and bleached hair and easy to wave hair; the regular is for the normal type of hair; super is for resistant hair and we have a little girl's package which is intended for use on children, little girls, and we have the pin curl permanent for a different type of wave.

Q. You have furnished me—I have here I think four cartons, or boxes, which you have referred to —the Cara Nome [61] natural curl pincurl permanent, and that's the one involved here, is that correct? A. Yes, sir.

Q. Then here's the natural curl, fast, regular, for normal hair. I notice a Cara Nome natural curl permanent for little girls, and a natural curl, fast, permanent, gentle, for easy to wave hair. Are those some of the products you put on the market?

A. That's correct.

Mr. Packard: I"d like to offer those, your Honor.

Mr. Lanier: No objection, your Honor.

The Clerk: Defendant's Exhibits C, D, E and F, marked and received.

(Whereupon, the four cartons in question, were marked Defendant's Exhibits C, D, E and F, received in evidence and made a part of this record.)

(Testimony of Arnold L. Lewis.)

Q. (Mr. Packard, resuming): Now, in connection with the compounding of your cold wave solution, do you have a chemist that prepares the solutions and makes them? A. Yes, we sure do.

Q. And, now talking about the pincurl permanent, the one in question here, under your license agreement and the compounding of this particular type of solution, what is the range of "thio" content, or thioglycolate content to be placed in that product?

Mr. Lanier: If the Court please, that is now objected to upon the grounds that it has obviously been testified to and it is not the best evidence. The man is not qualified as a chemist. The best evidence is obviously the formula given him by whomever he gets the formula from.

The Court: Well, he's the manufacturer. I'll permit him to testify.

A. Well I'm familiar with the formulas.

Q. Well I didn't ask you for the formulas, I just asked for—what do you normally——

A. A pincurl permanent?

Q. Yes.

A. A pincurl permanent is intended to be a casual type of permanent and has the strength from six and a half to seven and a half percent "thio" content, with the same 9.3 PH. [63]

Q. I believe Dr. Jeffreys explained the PH, but that's when it goes——

A. The alkalinity.

The Court: Is that what they call the neutralizer?

(Testimony of Arnold L. Lewis.)

The Witness: No, sir. It's the alkalinity of the solution itself.

The Court: Part of the substance in the bottle, what we saw——

The Witness: Well when the solution is finished, that is the alkalinity of it. We bring it up to that alkalinity point.

Q. (By Mr. Packard, resuming): Now you keep records pertaining to tests made of the various batches as they are placed on the market?

A. Well each time a batch is made—to begin with it has to be very carefully calculated for the "thio" content, and before the batch is finished, it has to be brought up to the alkalinity point by the addition of ammonia, and the thio content is then determined by chemical titration, the alkalinity is determined by Beckman's PH meter, which is an electrical device to determnie PH. [64]

Q. And was this done under a chemist at your plant? A. Yes, sir.

Q. And you keep records of each batch, as to the——

A. We keep a laboratory record of each batch, and with a code number covering each batch.

Q. Mr. Lanier, I believe, has the original of this document, which is—I show you a photostatic copy of the Studio Cosmetic Company's cold wave manufacturing record, and it has serial number 181, product, pincurl, dated October 22, 1954, and I ask you, Mr. Lewis, if this is a record kept in the normal course of business? A. Yes, it is.

(Testimony of Arnold L. Lewis.)

Q. And is this record kept under your control and direction? A. Yes.

Q. And that's in connection with the manufacture of your product, pincurl? A. Correct.

Mr. Packard: I offer this, your Honor, as Defendant's next in order.

Mr. Lanier: If the Court please, might I be permitted to ask a question or two preliminary to a possible objection?

The Court: You may. [65]

Mr. Lanier: Referring to the exhibit—what number is that?

The Clerk: Exhibit G marked for identification.

Q. (By Mr. Lanier): Exhibit G, Mr. Lewis, at the bottom of that exhibit, that is signed with the initials "L.G.M.". Will you tell me who those are?

A. That was a chemist that was in my employ at that time, by the name of L. G. Monteau.

Q. This is the same Monteau then that I have made several efforts to get the address. Is that correct? A. That's correct.

Q. And this entire batch was made under his personal supervision, direction and control?

A. Correct.

Q. And what actually went into that is known by him. Is that correct?

Mr. Packard: Well I object. It is not a correct statement, "that is known by him". The record speaks for itself.

(Testimony of Arnold L. Lewis.)

The Court: I suppose he wouldn't know it, only by the record Mr. Lanier.

Q. (By Mr. Lanier, resuming): First of all now, for instance, [66] in the original which I hold, of which you have a photostatic copy, would you tell me in whose handwriting that is filled out?

A. It's his handwriting.

Q. He is the one personally who filled this report out?

A. That's correct, but from our formulation.

Q. From your formulation?

A. Correct, sir.

Q. But nevertheless he filled this out according to what he said by this report—Exhibit G went into that 181.

A. This is his laboratory record.

Q. Of what went in to 181?

A. That's right.

Q. You, yourself, only go by the notations that are here as to what went into it?

A. Well if you mean that I stood there and watched every batch being made, I'd say no I didn't do that.

Q. But that was the chemist's responsibility?

A. That's right. That's why I employed him, for that purpose.

Mr. Lanier: It's objected to, if the Court please, upon the ground that it's not the best evidence, no opportunity of cross-examination. [67]

Mr. Packard: Ordinary record kept in the ordinary course of business, kept under his direction.

(Testimony of Arnold L. Lewis.)

The Court: I'll admit it in evidence.

The Clerk: Defendant's Exhibit G is admitted.

(Whereupon, the document referred to, heretofore marked for identification Defendant's Exhibit G, is received in evidence and made a part of this record.)

Q. (By Mr. Packard, resuming): Now, at the bottom of this record—first of all let me state, it says "Batch No. 181, Formula Number pincurl, batch size 325 gallons, date started, October 22nd, date filtered, October 22, '54, date filled October 22nd." Then it has here "Ammonium thioglycolate, 52.8%, quantity used 365 pounds, supplier Halby, Lot No. 2922". Who is Halby?

A. Halby is the manufacturer of the raw material—of ammonium thioglycolate.

Q. And then it shows all the ingredients in various proportions that go into that product—correct?

A. Correct.

Q. And at the bottom it has "Analysis. Finished batch." And then it has "thioglycolate acid 7.07", and it has [68] 3 ammonia——

A. Point-eight-five.

Q. And it has PH. A. Nine-point-three.

Q. Now, Cara Nome, I believe the testimony is, that's a brand name for Rexall's Drug. Is that correct?

A. That's correct; it's their brand name.

Q. I don't know whether I've asked you this, but for what period of time have you been furnishing Rexall with cold wave solutions?

(Testimony of Arnold L. Lewis.)

A. Well we furnished them with cold wave solutions under another brand name, prior to the Cara Nome name which we furnished them and which we have assigned to them, being the name "Helen Cornell". That brand name was furnished in the years 1946, '47 and '48, I believe.

Q. So we will understand how these products are bottled and shipped and so forth, during the time that you were handling this Helen Cornell, did you have an agreement of some type with Rexall to furnish them with all their cold waves?

A. Correct.

Q. And during the period of time, were you able to produce all of the cold wave solutions they needed themselves? [69]

A. No, our facilities were not adequate enough at that time to take care of their entire requirements.

Q. And so what did you do in order to obtain adequate facilities?

A. I made an arrangement with another company to have our bottles filled by them, and they in turn sent them to us. The formulation was identically the same as our formulation, and we labeled them and put them in the kits after we received them.

Q. And what Company was this?

A. That was the Toni Company.

Q. And have you run tests on their products to determine their chemical composition?

(Testimony of Arnold L. Lewis.)

A. Oh, yes; we spot-checked the shipments as they came in.

Q. And did they compare to your formula?

A. Correct.

Q. Now, have you manufactured any cold wave solutions by any other manufacturers in which you furnished the cold wave solutions or the product that they put out?

A. Primarily our business is a private-label manufacturing business, and we at one time manufactured cold waves for Leader Brothers, a product under the name of "Shadow Wave", which they distributed nationally for two or three years. [70]

Q. And did you use the same formulas or basic content——

A. We used the same formulas, of course.

Q. And have you continued to the present day to use the same formula?

A. That's correct.

Q. To your knowledge, have there been any complaints, other than the one we have here in question, about batch 181?

A. I have no knowledge of any other complaint from that particular batch.

Q. And have there ever been any complaints about any of the cold wave solutions that you ever put on the market, wherein any person claimed that they had permanently lost their hair, or permanent damage to their hair?

A. Never had any such complaint.

(Testimony of Arnold L. Lewis.)

Q. And how many of these kits do you put on the market annually?

A. Well, in the—for Cara Nome, I would estimate that we average about 450 thousand kits a year.

Q. Now, in connection with batch 181, I believe the evidence indicated it was compounded, filtered and packaged on October 22, 1954, and I believe it was 325 gallons. Now, how many bottles would that fill, do you know? [71]

A. The yield from that batch was about 10,400 bottles.

Q. And do you know where they were shipped?

A. Yes, I do. Our records were checked and about fifty percent of that quantity was shipped to the Rexall Drug Company in Chicago, and the balance of it was shipped to East Point, Georgia, which is also a Rexall point of distribution.

Mr. Packard: Now, I don't know whether this is a stipulation or not, your Honor, but as I recall—was it August 16, 1955—is that a stipulation, Mr. Lanier, the first notice that——

Mr. Lanier: No, the record shows July 5, 1955.

Mr. Packard: I don't think the record shows that, your Honor. Maybe I better ask the question.

Mr. Lanier: You have an exhibit, copy of a letter, in evidence, counsel, dated July 5, 1955.

Q. (By Mr. Packard, resuming): Let me ask you, Mr. Lewis, do you recall when you first had notice, or were [72] aware of the fact that a claim was being made by the plaintiff in this action?

(Testimony of Arnold L. Lewis.)

A. Well, I think the first notice I had on it was in August of 1955; I can't be certain.

Q. Mr. Lewis, I show you a document in the original file here, which is referred to as "Answer to Plaintiff's Interrogatories", which was filed with this Court on August 27, 1957, and in No. 5, Question No. 5, which you answered, it says "In what proportion are such ingredients placed in a bottle of the size alleged to have been sold to plaintiff herein". I believe your answer was, "Ammonium thioglycolate, 5%; aqua ammonia C.P. .75%; distilled water 94.25%".

Now, was that the answer that you gave in your interrogatories? Is that correct, sir?

A. Well I gave that answer based——

Q. Well, now, at the time you gave your answer, what was your understanding or belief as to the alleged type of cold wave solution that had been used by the plaintiff?

A. Well, I didn't have any information other than the fact that when the papers were served on me, it was [73] indicated that the plaintiff was a minor, and I assumed that the package for little girls—the home permanent for little girls had been used on this party. I had no other way of knowing anything different.

Q. Did you have any knowledge that it was a pincurl at the time you answered that question?

A. No, sir, that's why I answered that—I thought that was the little girl's and contained five percent.

(Testimony of Arnold L. Lewis.)

Q. Is that what the little girl's contained?

A. Correct, that's the content.

Mr. Packard: On that point, your Honor, I would like to offer the original Complaint filed on February 19, 1957, into evidence by reference on this particular point, your Honor, and as well as the amended complaint filed with this court on April 2, 1957, and both of those documents I would like to have offered into evidence by reference with the understanding that either party may read any portion they so desire, but I am not requesting that it go to the jury room.

The Court: Any objection? [74]

Mr. Lanier: If the Court please, I have no objection whatsoever. Of course if it's going to be marked as an exhibit and received, it has to be treated as all the other exhibits. I have no objection to them being so received.

The Court: I think it's proper to introduce a pleading which is part of the case by reference, so that if anybody wants to refer to it, they may be permitted to do so without objection. I'll receive the offer.

Mr. Packard: I don't particularly want it to go to the jury room. I tell you I'm in a position that I would like to put on the guardian ad litem and question him, but he isn't here. That's the spot I'm in.

I would like to read. I'm going to read to the jury from the Amended Complaint, which was

(Testimony of Arnold L. Lewis.)

filed on April 2, 1957, Paragraph 3, commencing on line 14, which reads as follows:

"That on the 5th day of February, 1955, plaintiff purchased from the Kensal Drug Company, of Kensal, [75] North Dakota, a bottle of said product of Cara Nome, which had been obtained from and through defendants", and may we have a stipulation, counsel, that that's the only reference made to this particular product as Cara Nome in the complaint, in the amended complaint?

Mr. Lanier: Counsel, if you will wait and let me get hold of these pleadings, I'll check along with you and see.

(Counsel examines pleadings.)

Mr. Lanier: Insofar as the amended complaint is concerned, counsel, yes.

The Court: Yes, what?

Mr. Packard: That the only reference to the product is made to Cara Nome. We have the same stipulation so far as the original complaint, I believe that's true?

Mr. Lanier: That's correct.

The Court: The only reference is in the original complaint? [76]

Mr. Packard: The original complaint and the amended complaint, the only reference to the product names it as Cara Nome.

The Court: In the original complaint?

Mr. Packard: And the amended complaint too. Both of them name it only as Cara Nome, and

(Testimony of Arnold L. Lewis.)

there's no designation as to what type of Cara Nome product.

Q. (By Mr. Packard, resuming): Then I show you plaintiff's Exhibit No. 2, a letter under the date of July 5, 1955, in which it states:

"A Miss Sandra Nihill has been to my office to make a claim against your company—this is to Rexall—as the result of the use of the Cara Nome natural curl kit, which has made her lose all of her hair", now, from the complaint and that letter, are you able to determine that this cold wave solution was a pin curl? A. No, sir.

Q. And when you answered the interrogatory referred to there, you assumed it was a child's, is that correct? A. Correct. [77]

Q. And, how does a pin curl differ from a natural curl home kit—in what respects, Mr. Lewis, do those differ?

A. Well, in giving an ordinary home permanent, the individual uses a plastic curler, that is a number of plastic curlers, sometimes as many as fifty or sixty to the head, depending on the amount of hair, and the solution is applied to each strand of hair as it is parted. In other words, they take a small strand of about an inch or three-quarters of an inch width, and out to the length of the hair. That section of the hair is moistened with the waving solution and then paper is applied to the ends of the hair and it is wrapped on curlers, rolled on curlers, that would be better to say, and then fastened with a rubber fastener, and when this process

(Testimony of Arnold L. Lewis.)

is completed, the curls are again moistened with the solution by use of a piece of cotton or an eye-dropper, and then the timing begins and, according to the type and texture of the hair when the timing is completed, the solution is rinsed, the head is rinsed. This is all done before the curls are taken off, and then the neutralizer is applied, and after the curls are taken off the neutralizer is again applied, and the wave is [78] then set in pin curls and allowed to dry. Now you asked me the difference, did you, between that and a pin curl?

Q. Yes.

A. A pin curl wave differs in this respect, that, first of all a pin curl is intended to be a loose casual type of wave because of a change in hair styles which occurred somewhere in 1954, along in that period of time. And this was a type of permanent which was devised to give a permanent curl to the hair, not to the degree of permanency of the other type of permanents, possibly the curl would only stay in six to eight weeks as opposed to four or five months with the other type, and this was developed with the idea being that you could set the hair in pin curls, apply the solution, apply the neutralizer and leave the hair up in pin curls until it's dry and then brush it into the desired style.

Q. Now, in any of these cold waves of the various types you have testified to, the fast, the general, the pincurl, and natural, do any of them carry instructions stating to pour the solution over the hair at the end?

(Testimony of Arnold L. Lewis.)

A. No, sir, we do not state that. That would be a wrong method of application. [79]

Mr. Packard: Where are those kits?

(The Clerk furnished counsel with the instructions contained in the kit.)

Mr. Lanier: Has that been marked?

Mr. Packard: What exhibit is it?

The Clerk: It's 1.

Mr. Lanier: Why don't you mark it 1-A.

(Whereupon, Defendant's Exhibit 1-A is marked for identification.)

Q. (By Mr. Packard, resuming): Now, in connection with your product, do you place any warning instructions, under conditions, that this Cara Nome natural curl pin curl permanent should not be used—do you have any warnings in that?

A. Yes, we state plainly in the instructions when this product should not be used.

Q. Please state what your instructions contain insofar [80] as that is concerned?

A. The first line, which of course is important, is to read this carefully before you start your pin curl permanent. If your scalp is sore, irritated or scratched, postpone your wave until this condition is corrected. If your hands are chapped, sore, cut or especially sensitive, wear rubber gloves while giving the wave.

Q. Read the next one. Read the instructions.

A. These are not the instructions.

Q. I know.

A. Keep pin curl lotion tightly capped at all

(Testimony of Arnold L. Lewis.)

times. Don't leave pin curl lotion and neutralizer where children or pets may get them. They must not be taken internally. Wait at least two months between permanents. Trim off ends of old permanent for a softer, prettier wave. The bobby pins supplied in this package are especially treated and should be used only once in giving a pin curl permanent. Use only new enameled bobby pins or aluminum curl clips if you need more curls. Pin curl lotion may turn purple when it touches some bobby pins, but neutralizer will correct this. Don't use any coloring products on [81] your hair for at least a week before or after a permanent.

Q. Then you have set forth without—and I don't want you to go through, the jury will have an opportunity to read these instructions, but, generally speaking what is the procedure set forth insofar as the giving of one of these cold waves?

A. For the pin curl?

Q. Yes.

A. Well after the hair is shampooed and while the hair is——

Mr. Lanier: If the Court please, I want to object at this point, purely for the purpose of saving time. The directions are in evidence. They speak for themselves.

The Court: I take it there is some explanation.

Mr. Packard: Well, maybe counsel is right, saving time. Rather than read all the instructions into the record, I thought he could just generally

(Testimony of Arnold L. Lewis.)

state. I was trying to save some time by having him to do it that way. [82]

The Court: Proceed your own way.

A. Well, in simple language, the hair is shampooed with a good shampoo, and while the hair is still damp——

The Court: You don't specify what kind and make of shampoo, do you?

The Witness: We state that they should use a good grade of shampoo.

A. (Resuming) And while the hair is still damp, the hair is put up in pin curls as diagrammed in the instructions. There are no curlers used in this wave, excepting at the back of the neck where the hair might be short, and we supply in the kit, six plastic curlers, with the end papers, so that those curls can be wrapped on the curlers, rolled on the curlers, because at that point it might be a little too short for them to pin curl. After the entire head has been pin-curled, and curlers in the back, then the solution is applied by a piece of cotton and each curl is thoroughly saturated with the solution. I'm speaking of the waving solution. Now, after a wait of ten minutes, the instructions call for look at the—taking [83] down one of the curls to see whether there is any pattern of wave which is described in the instructions, and if the pattern has already been established, then perhaps the time is sufficient. Some hair will take a wave faster than other hair, depending on its resistance, and it's cleanliness. Then if the timing has to con-

(Testimony of Arnold L. Lewis.)

tinue, they continue this timing and they put more solution on by use of the same method of applying it with the cotton or the eye-dropper and saturating each curl again. Following the finish of the timing period, the solution is then rinsed from the hair with warm water, the curls are not taken down at any time during this operation. When the neutralizer solution is applied to the hair, a wait of ten minutes is then prescribed again, and again the finish of the neutralizer solution is poured over the head into a basin generally with the head lying back so that the water will pour off towards the back. After this is completed, the hair is supposed to be again rinsed with warm water, clear water, and then all of this moisture then, or whatever moisture may be on the hair at that time, is supposed to be sopped up with a towel and the hair permitted to dry. After the hair dries [84] the pin curls are taken out—the pins are taken out—and the hair is brushed back into the desired style.

Q. Is there any particular instruction—or I should say there is an instruction which reads you should never leave the waving lotion on the hair for longer than thirty minutes?

A. That's correct.

Q. Now, you have seen these so-called guarantees, I am referring to this type of guarantee. Did you ever put those in your boxes, when you shipped them out? A. No, sir.

Q. When I say that I also refer to the green one too?

(Testimony of Arnold L. Lewis.)

A. No we have never put anything like that in our packages.

Q. And have you at any time paid for any type of advertisement for any Cara Nome products?

A. No, sir.

Mr. Packard: I believe that's all the questions I have, your Honor.

The Court: Do you have any questions Mr. Bradish?

Mr. Bradish: No, your Honor, not at this time. It's pretty close to the lunch hour, I think. [85]

The Court: Very well. The jury may pass, under the same injunction heretofore, not to talk about the case. Be back at two o'clock ready to proceed.

(Whereupon, the hearing in the within cause was adjourned until 2:00 o'clock p.m.)

Afternoon Session

(Whereupon, at the hour of 2:00 o'clock p.m., the hearing in the within cause was resumed pursuant to the noon recess heretofore taken, and the following further proceedings were had in open court:)

The Court: Proceed.

Whereupon,

ARNOLD L. LEWIS

resumes the witness stand for further examination, as follows:

Cross Examination

Q. (By Mr. Lanier): Now, Mr. Lewis, I be-

(Testimony of Arnold L. Lewis.)

lieve you stated that you manufacture for the Rexall Drug Company five different types of [86] permanent home wave solutions under the trade name "Cara Nome". A. Correct.

Q. And one of those being "gentle", so labeled?

A. Yes.

Q. One being "regular", for normal hair?

A. Right.

Q. One being "super"? A. Right.

Q. For particularly resistant hair?

A. Correct.

Q. And a fourth being a little girl permanent solution? A. Correct.

Q. Now of those four none of them are pin curl waves, are they? A. No, sir.

Q. And on those four, you have them labeled especially for different particular types?

A. Right.

Q. You only make one pin curl wave?

A. Correct.

Q. For all types? A. That's right. [87]

Q. So when we're discussing so far as this case is concerned, a particular type of wave that you make, which was used in this case, the pin curl Cara Nome wave, it is the only pin curl wave made, Cara Nome? A. That's right.

Q. All right. So we don't have to distinguish between types of hair and what not insofar as that pin curl wave is concerned?

A. Well only that the other types of permanents

(Testimony of Arnold L. Lewis.)

can also be used in the same procedure for pin curling.

Q. Does it say so?

A. It doesn't say so, but that is a known fact.

Q. A known fact to whom?

A. Well I think a known fact to professional beauticians.

Q. But not to people at home?

A. And people who have been giving themselves permanent waves for many years. They can use it for any method. A lot of people at home use them both ways.

Q. Do you recommend, on the other four solutions, going ahead and using them with pin curls without specific directions on how to use them?

A. We don't recommend it, but I know that they do it.

Q. All right. But, nevertheless, you make one pin curl [88] home permanent wave?

A. That's right.

Q. Now you have stated that you are testifying from your knowledge of certain formulas that you have a franchise to use. Is that correct?

A. Correct.

Q. Do you have a specific formula for the pin curl Cara Nome home wave solution—lotion?

A. No specific formula for pin curl anymore than we have a specific formula for any of the other types.

Q. Well now what do you mean by that, I understood that you did?

(Testimony of Arnold L. Lewis.)

A. The license doesn't cover the formulation, it covers the use of thio in permanent waving, as described in the McDonald patent.

Q. Do you have the formula with you?

A. No, sir.

Q. Can you produce it?

A. I can produce my own formulas. I can also produce the McDonald patents if that's necessary.

Q. I just want to make sure that I understand and that this jury understands, Mr. Lewis. I understood, if I'm wrong correct me, that you have a franchise for a specific formula for the making of the waving lotion. [89] Is that correct or not?

A. It's incorrect. Under a royalty agreement we can make permanent wave solutions under the McDonald patent, which provides for the use of thio in permanent waving solutions.

Q. All right. Then if I understand you correctly, that use of someone else's patent is something which you have a right to use? A. Correct.

Q. The specific formula, you, yourself, make up?

A. In the various strengths or the——

Q. Yes.

A. Formula is prescribed in the patent. I didn't make up the patent.

Q. But the exact amounts of it to mix in these mixing bowls of yours, you do?

A. You have a certain amount of laxity in the percentage of thio that you can use under those patents.

(Testimony of Arnold L. Lewis.)

Q. Exactly. And that is controlled by the chemist in charge of your plant?

A. Not necessarily. It's controlled by our determined formulations.

Q. All right. Now this Monteau, who actually had charge [90] of batch 181 that we're talking about, how long did he work for you?

A. He worked for us about nine years I think.

Q. About nine years. Now, did I misunderstand you or did I not, did you say something about the Rexall formula?

A. I don't recall saying that.

Q. Is there any such thing as the Rexall formula? A. Not that I know of.

Q. You would not so refer to it? A. No.

Q. Now, you also referred to the fact that back in 1946, '47 and '48, you were furnishing a whole cold wave solution, for Rexall Drug, named Helen Carnell? A. Correct.

Q. And that sometimes you would manufacture it and at other times you would, I suppose, call farm it out, is that right?

A. Well as I previously stated, our facilities weren't adequate to supply the quantities required, and we had to call upon another firm for additional supplies.

Q. And that particular firm back there in '46, '47 and '48, that you called upon, happened to be Toni?

A. That's correct.

Q. And Toni in supplying it for you, I suppose

(Testimony of Arnold L. Lewis.)

supplied the same thing that they use for their Toni? A. Correct.

Q. So that all this advertising and what not to the public really doesn't mean much, does it?

A. I don't know what you mean by that.

Mr. Packard: I object. That calls for a conclusion of the witness.

The Court: I think I'll permit him to answer it.

Q. You don't know what you mean——

A. I don't know what you mean.

Q. In other words, when a buying public depends upon the name "Cara Nome" or the name "Toni" or what not, it might be "Kee-We" or something else?

A. Well this was common procedure in the cosmetic business. Many firms are in business and make at least maybe a dozen or two dozen different products—the same products for two or three dozen different firms.

Q. All the same, except they put a different label on it?

A. Pretty much the same, I'd say.

Q. Yes. In fact identical, many times? [92]

A. Lots of times it's identical.

Q. Just a question of what label you want to put on the bottle?

A. Sometimes they change it in some aspect, probably they put perfume or they color it, something of that nature.

Q. Do you know how many batches of pin curl Cara Nome home wave you have made in this year of 1958?

(Testimony of Arnold L. Lewis.)

A. Well I can't be certain. I imagine we have made several batches.

Q. I don't mean "imagine." I want to know if you know.

A. I can't be certain. Without going to the records, I wouldn't know.

Q. You don't know.

Mr. Packard: I object. This is immaterial, irrelevant and incompetent.

Q. Now, when you speak of 450,000 kits a year, you are speaking of all five of your Cara Nome?

A. Correct.

Q. How many pin curls?

A. Approximately ten percent of that total.

Q. In other words, we are speaking actually of about [93] 45 thousand kits—correct?

A. I would say about that.

Q. And in any one given batch about 10,400?

A. Well that particular batch yielded 10,400.

Q. All right. Which, then, would be about a fourth of your yearly output in that one batch so far as pincurl is concerned?

A. A fourth—what do you mean by that?

Q. You state about 45 thousand——

A. Oh, I understand yes.

Q. About a fourth?

A. That's approximately correct, yes.

Q. Half of that batch went somewhere in Georgia, and half of it somewhere in Chicago?

A. It went to Chicago, and one went to East Point, Georgia.

(Testimony of Arnold L. Lewis.)

Q. For distribution from Georgia in that southern area, and for distribution from Chicago, in that central area?

A. Midwestern area, I presume.

Q. Now, these various waves—let's take the little girl's home wave. That is made up and used for little girls of what age?

A. I didn't understand you. [94]

Q. The little girl's wave? In going through these five different types, that is made up from your manufacturing company, for Rexall Drug, under the tradename Rexall-Cara Nome, for little girls?

A. Correct.

Q. What age little girl?

A. Oh, I don't know what age could be defined as a little girl; I imagine it's about age sixteen or seventeen, from about five to seventeen.

Q. That's what you consider a little girl?

A. I always considered that. I considered my daughter a little girl.

Q. I show you Plaintiff's Exhibit D. Want you to look at the picture on the outside. It that the little girl which you make up that particular formula for? A. That's correct.

Q. Does that look like a sixteen or seventeen year old?

Mr. Packard: I object. This is argumentative.

The Court: That's argumentative.

Q. But that's your advertising. That's what it's meant for, is it not, as it appears on Exhibit D?

A. That's it exactly, that's the package.

(Testimony of Arnold L. Lewis.)

Q. Now at the time that you answered the Plaintiff's interrogatories, which counsel was asking you about, and at which time in answer to the percentage that was in the Cara Nome permanent wave, that you said five percent, I presume that, in the first place, you got the questions to those interrogatories from your lawyer, did you not?

A. That's right.

Q. And I presume that they were made out, naturally, with his help and assistance?

A. You mean the answers?

Q. Yes.

A. Well I answered them as he questioned me. I don't think he gave me any help.

Q. That's what I mean. Don't get me wrong Mr. Lewis. I don't mean he answered them for you, but I mean he was there at the time? A. Yes.

Q. And as a matter of fact, probably done in his office, was it not? A. I believe it was.

Q. And the actual date on them was August 26, 1957. Is that correct? [96]

A. I can't answer that, if it's marked though, that would be the date.

Q. Showing you the last page, page 7, is this your signature?

A. Is this the interrogatory you are asking me to look at?

Q. Yes. There's page 1. You can look at them.

A. That's right.

Q. And this is your signature?

A. That's right.

(Testimony of Arnold L. Lewis.)

Q. And that is notarized and dated the 26th day of August, 1957—correct? A. Correct.

Q. All right. Now, then, I also show you in the official files Defendant's Memorandum of Contentions of Fact and Law, and ask you what date appears on the fifth page of that?

A. What is the document you are referring to? The date appears to be the 26th.

Q. 1957? A. Correct.

Q. Of August? A. That's right. [97]

Q. The same date? A. That's right.

Q. All right. In that document, the following is stated: "The defendants contend that if plaintiff followed directions contained in the Cara Nome Natural Curl Brand Pin Curl Permanent"—correct?

A. That's what it states there, but this is the first time I've ever seen this document.

Q. All right. That's what it states. So at least you were in your lawyer's office on August 26, 1957. Is that correct?

A. That's right. I beg your pardon. I may not have been in there on that date. I may have signed that on that date. I may have been in there a few days earlier than that.

Q. Well at least it's obvious that on the same date your lawyer knew we were talking about pin curl permanent.

A. No, it isn't necessarily obvious——

Mr. Packard: I object. That's argumentative. Assuming facts not in evidence.

The Court: It's argumentative. [98]

(Testimony of Arnold L. Lewis.)

Mr. Lanier: Now, if the Court please, I would like to read into evidence—going to introduce it if necessary, the same as he did with the other exhibit —the fact that in the defendant's Memorandum of Contentions of Fact and Law, dated August 26, 1957, signed by Mr. Backer, of the defendant firm, and filed with this Court on August 27, 1957, that in four, five, repeated paragraphs on page 2 thereof, it is specifically referred to as the bottle involved in this case being "Cara Nome Natural Curl Brand Pin Curl Permanent."

Mr. Packard: Your Honor, if I may object upon the basis that there is no proper foundation laid to show that the defendant in this action, Mr. Lewis, had the same knowledge the attorney did, and the question says "alleged," and it was alleged in the complaint and on this notice. I mean just because an attorney files a memorandum of law it doesn't mean that Mr. Lewis, in his answer, is bound by the knowledge of the attorney.

The Court: Not necessarily so, and yet I think it's proper to go into the record for whatever it's worth.

Q. (By Mr. Lanier, resuming): Now, is it not the truth, Mr. [99] Lewis, that at the time your Company manufactured the pin wave solution and lotion involved in this lawsuit and at the time that it was delivered for retail sale to the general public, and at the time that you answered these interrogatories, that you thought that there was five percent solution of ammonium thioglycolate?

(Testimony of Arnold L. Lewis.)

A. No, sir, that it not the truth.

Q. That is incorrect?

A. That is absolutely incorrect.

Q. All right. Now in your various steps in your directions, Mr. Lewis, which you have them basically one, two and three, I believe—correct?

A. Correct.

Q. With various subdivisions underneath them. First of all No. 1 is speaking of the shampooing and the pin curl setting—correct? A. Yes.

Q. And No. 2 speaks of the steps in applying the pin curl lotion—correct?

A. May I have one of the directions, so I can follow your questions?

Q. Surely.

A. I have one in my pocket, may I use it? [100]

Q. Yes, surely. Now, I am referring to Exhibit 1-A and I am presuming—and I'm sure they are, at least all I have ever checked—that the copy you are holding is the same. Now, step No. 2, with its various sub-divisions in it and under it, apply to the application of the pin curl lotion—correct?

A. Yes.

Q. And that is referred to as a lotion?

A. Correct.

Q. All right. Now that is the lotion in which there is the ammonium thioglycolate?

A. Correct.

Q. And in whatever percentage we are talking about—correct?

A. That is the thio solution, that's correct.

(Testimony of Arnold L. Lewis.)

Q. Correct. And it's referred to as a pin curl lotion? A. Umhum.

Q. Now, when you come to No. 3, that and its various steps under it, are the neutralizing steps—correct? A. Yes, sir.

Q. And there again we refer to the neutralizing solution—correct?

A. Neutralizer solution, that's right.

Q. Correct. Now, then, in the second step in that, do [101] I read correctly when I say "Now pour the remaining neutralizing solution through the hair, catch it in a bowl, and use fresh cotton to saturate all the curls repeatedly."

A. You didn't read it correctly.

Q. Would you read it please?

A. "Pour half of the neutralizing solution into a large clean bowl and with fresh cotton saturate every curl thoroughly with neutralizing solution."

Q. Well now you're reading step No. 1, are you not? A. I'm reading step No. 3.

Q. All right. You're reading the first subdivision under 3.

A. There's just one paragraph under 3.

Q. Now go to step 2. Would you read it please?

A. Back to applying the pin curl lotion?

Q. The neutralizer. Step No. 3, paragraph 2. Would you read it.

A. Oh, I beg your pardon. "After the wait of five minutes?

Q. Correct.

A. "Now pour the remaining neutralizer solution

(Testimony of Arnold L. Lewis.)

through the hair, catch it in a bowl, and use fresh cotton to [102] saturate all the curls repeatedly."

Mr. Lanier: That's all counsel. Excuse me counsel, one more minute. Sorry, your Honor. There is something here I did want to check on. I think possibly I better come over here, your Honor, so the witness can see to what I am referring.

Q. (By Mr. Lanier, resuming): In this same interrogatories which you answered on August 26, 1957——

A. May I correct that? I may not have answered it on that date. I probably signed a typewritten copy on that date which the attorney filed. The date shown is the 26th and that is the date I perhaps signed it and appeared before the notary on that date to have my signature notarized. I know that I answered it several days before the date that I signed it.

Q. At least that is the date that you signed it?

A. That is correct.

Q. All right. Now, I want to ask you, on that date or whenever it was that you filled out these interrogatories, at least the ones we are speaking of, if you were asked the following question and gave the following answer: "If your answer to the foregoing question is that you don't know because you have not seen the bottle, if you [103] are shown the alleged bottle would you be able to say?" And your answer is—no

(a) "Whether or not you manufactured a product sold in such a bottle?"

(Testimony of Arnold L. Lewis.)

Your answer was—

"If shown the bottle I would be able to state whether or not that bottle was actually filled with our product."

(b) "What the ingredients therein are?"

Answer—

"The ingredients would be as heretofore stated.

(c) "Are the ingredients in the same proportions in all such products?"

Answer—

"Virtually the same."

Did you or not have those questions asked and did you so answer?

A. Yes I answered that and that's absolutely correct. They are virtually the same.

Q. Do you recall that in that same interrogatories, the following question, on page 4 counsel, at line 22, was asked and the following answer given:

Question—"Has the product, Cara Nome, been submitted to specialists in the medical profession on hair and scalp, together with the list of ingredients and proportions [104] used to determine what effects would be on hair and scalp?"

And your answer was "No."

Do you remember that question and answer?

A. That's right.

Q. Mr. Lewis, do you recall the following question and answer being given—page 5 counsel, line 16:

"Did defendant, Rexall Drug Company, before en-

(Testimony of Arnold L. Lewis.)

gaging in the distribution of said product, familiarize itself with the ingredients in said product?"

Mr. Packard: Well, now, I object to that. It certainly would call for a conclusion of this witness, whether Rexall did something.

Mr. Lanier: I believe that's true, your Honor. I'll withdraw that question and use it in another interrogatory in rebuttal.

That's all.

Mr. Packard: I don't have any further questions.

The Court: That will be all, Mr. Lewis.

(Witness is excused.) [105]

Mr. Packard: Defendant rests, your Honor.

The Court: Are all your exhibits in?

Mr. Packard: I want to offer this diagram.

The Court: What's the number?

Mr. Packard: Defendants' A.

Mr. Lanier: I have no objection.

The Court: Defendants' Exhibit A is admitted in evidence.

(Whereupon, the diagram, heretofore marked for identification, Defendants' Exhibit A, is received in evidence and made a part of this record.)

Mr. Packard: I rest, your Honor.

Mr. Bradish: Defendant, Rexall, rests. [106]

Mr. Lanier: Just one thing, your Honor. I would like to read into the record from the interrogatories of Thomas H. Stark, Assistant Manager Insurance & Tax of Rexall Company, at page 2.

Mr. Bradish: Well now, just a minute. What is

the purpose of this being read into evidence? If the purpose of it is for impeachment, I object on the ground that there is no proper foundation laid.

Mr. Lanier: It's not offered for impeachment. It's offered for substantive evidence, your Honor.

Mr. Bradish: Witness Stark was here, your Honor, on three different occasions. I don't know what he is going to read. What are you going to read?

Mr. Lanier: Question 14—the question and answer. All questions in depositions and interrogatories, your Honor, if material, are admissible.

Mr. Bradish: I'll stipulate you can read No. 14 question and answer. [107]

Mr. Lanier: Well then we don't have any argument, do we counsel?

Mr. Bradish: Not right now we don't, but we are going to in a little while.

The Court: You may read it in Mr. Lanier.

Mr. Lanier: "Question: Did defendant, Rexall Drug Company, before engaging in the distribution of said product, familiarize itself with the ingredients in said product?"

"Answer: Yes."

Mr. Lanier: Plaintiff re-rests, your Honor.

Mr. Packard: May we approach the bench, your Honor?

The Court: You may.

(Whereupon, counsel for the respective parties and the reporter approached the bench and the following took place out of the hearing of the Jury:) [108]

Mr. Packard: I anticipate I will have certain Motions and I don't know whether your Honor will want to discuss instructions also, and I have in mind it may take pretty much of the afternoon.

The Court: I think I will excuse the jury then. Is that satisfactory?

Mr. Lanier: It's satisfactory.

(Thereupon, the following proceedings were had in open court:)

The Court: We've come to the end of the evidence finally—not the end of the case by any means. You are still under injunction not to talk about the case or try to make up your minds about the ultimate result until you've heard the arguments of counsel and the instructions of the Court, but there are certain matters between the Court and counsel that will take a little time and I don't see that it's worth while to keep you here for little time I might have before four-thirty, so I think I'll [109] excuse you at this time and you may go on until ten o'clock tomorrow, and we will have you back in the jury box as quickly as we can reach you in the morning, after ten o'clock. Don't talk about the case to anybody or try to decide it.

(Whereupon, the jury was dismissed until ten o'clock a.m., April 15, 1958, and the Court, counsel for the respective parties, the reporter and the clerk, retired to Chambers where the following proceedings were had:)

Mr. Bradish: If I might just say one thing, your Honor, I think our job here has been reduced possibly by about fifty percent, because I notice by the

amended instructions proposed by Mr. Lanier that he appears to be abandoning any cause of action that he might have against Studio Cosmetics Company for breach of warranty, and he appears to be abandoning any cause of action which he might have against Rexall Drug Company for negligence.

Mr. Lanier: That is right, your Honor.

The Court: I saw some later instructions. I thought you backed up on that and changed your mind. Maybe I didn't read them—— [110]

Mr. Lanier: I might go a little bit further than that, your Honor, by withdrawing two more before we're through.

Mr. Bradish: Two more what?

Mr. Lanier: Instructions.

Mr. Bradish: As I gather it then, for the record, the Count No. 1 in negligence against Rexall is dismissed and Count No. 2 for breach of warranty against Arnold L. Lewis doing business as Studio Cosmetics Company is dismissed. Is that right?

Mr. Lanier: That is correct.

Mr. Bradish: So, we now have a situation where the case is proceeding against Lewis on Count 1 and against Rexall Drug on Count No. 2.

Mr. Packard: I think that the record should show that that is with the consent, or that's the theory of Mr. Lanier, that he is abandoning Count No. 2 as against Lewis, that is warranty, and No. 1 as against Rexall, as to the negligence, and he is proceeding at this time as [111] against Lewis on Count No. 1 for negligence and against Rexall for breach of warranty.

Mr. Lanier: That is correct. And with that, and while we are doing that, I might just as well for the record withdraw, and I do withdraw Instruction Requests Nos. 9 and 10 because we are also, so far as these instructions are concerned, and the theory under which we are now proceeding, abandoning any claim against either party under an implied warranty.

Mr. Bradish: Good. 9 and 10 then are withdrawn.

Mr. Lanier: Correct. Now, may I state to the Court, while we are doing this, and for the record, that I have felt at all times, and I do now still feel, that this action will lie against both parties for breach of express warranty and for breach of implied warranty and for negligence; but in order to protect this record and to simplify these instructions and to be as unconfusing to this jury as possible, I have totally abandoned implied warranty by my instruction request and I have abandoned holding the Rexall Drug Company for negligence under Count 1, and I have abandoned holding the Studio Cosmetics Company for breach of warranty under Count 2. [112]

The Court: But you are insisting on negligence as against Studio Cosmetics Company on Count 1 and express warranty as against Rexall on Count 2.

Mr. Lanier: Correct, your Honor.

Mr. Packard: I guess the record speaks for itself and there will be no point in making the motions to dismiss that we intended to make when we came in here on those particular counts.

The Court: That is a pretty fair surmise.

Mr. Bradish: We are certainly agreeable to the abandonment or the dismissal of those counts——

The Court: If you want to protect your record, you might make those motions—I mean as to the ones which remain.

Mr. Lanier: Yes. Counsel, there is only one question I have in there and, frankly, I do not care how you do it. I just thought that your whole record for both of our purposes might be better under proper instructions rather than a dismissal if you have a verdict finding [113] for the defendant under Count 1, and for the defendant——

The Court: You mean a verdict by the jury, Mr. Lanier?

Mr. Lanier: Yes. I don't care how it's done.

Mr. Bradish: I think a dismissal is certainly a disposition actually on the merits under our procedure, and——

The Court: Well, suppose the order is like this, in view of the statement made by counsel for the plaintiff: Count 1 is dismissed as to Rexall Company, and Count 2 is dismissed as against the Studio Cosmetics Company. I think the order of the Court——

Mr. Packard: That's what I wanted in the procedure, I want the order of the Court to take care in view of Mr. Lanier's statement. The court will make such an order.

The Court: I'll make such an order now.

Mr. Packard: Then, let the record show at this time, the defendant Arnold L. Lewis, doing business

as Studio Cosmetics Company, moves the Court for a directed verdict as to [114] Count 1, the only count remaining as against said defendant, which is based upon negligence. Said defendant urges said Motion for a directed verdict upon the basis that plaintiff has failed to state or to prove a prima facie case as against the defendant on the basis of negligence; taking all the evidence in the case and drawing all the reasonable inferences in favor of plaintiff's case, they have still failed to prove a prima facie case on the theory of negligence. Now, your Honor, there has not been one iota of evidence in this case showing any negligence on the part of the Studio Cosmetics in the preparation, mixing, compounding of this particular solution. All the evidence in the record here has been produced on behalf of the defendants themselves showing the chemical composition. The evidence clearly shows that seven percent is within normal range. It is accepted in the industry as being the percentage of thioglycolate acid contained in these products. There has not been one bit of expert testimony offered by plaintiff here showing that the chemical composition, as compounded by the defendant, did not meet the standards accepted in the industry as being within normal limits. We had the testimony of Mr. Lewis who testified and stated that seven percent [115] was the average range, the normal, for this type of product. We further have the testimony of Dr. Jeffrey who is a highly qualified chemist, who would run production-control tests in this type of solution. He stated that they varied I believe from three and

a half to four percent to ten percent in their content, that seven percent was the average or the standard content for this type of solution—this type of product—and he further testified that he ran an analysis on this particular batch, the very batch from which the plaintiff received her cold wave and that it was six point nine four I believe, with a PH factor of 9.05, or within the normal range, as to both of those; that he ran another subsequent test on some of the products and it was practically the same. All the records show that when we bottled it, we ran our own tests and it was 7.07, which is practically the same. There has not been any evidence whatsoever to show that it didn't meet with the standard in the industry. Further, there is no showing, as your Honor probably read the Briggs case and some of these other cases, there has been no showing to the effect that a solution in this particular percentage was deleterious or that it was injurious to people, normal persons, and so forth. [116] There has been no evidence whatsoever on that. I mean the entire case is absolutely void of any evidence which will show any negligence on the part of the defendant. Now, I anticipate Mr. Lanier is going to argue in his position as to the effect that he is relying upon the doctrine of res ipsa loquitur, which I certainly strenuously urge is not applicable in this case; that this is not a res ipsa loquitar case, and that the doctrine has no place in this case, and there has been no evidence whatsoever of any direct negligence and the doctrine of res ipsa loquitur is not applicable because of the fact that in determining whether you are going to

apply the doctrine you have to weigh the probability, that the probabilities are such that they preponderate in favor of the fact that this injury would not have resulted if it had not been for the negligence of some person. We don't have that evidence here. We have three doctors, I believe, that stated there was alopecia areata, and Dr. Starr said fragilitis crinium, and I believe Dr. Michelson, part of his testimony was he found that condition too, fragilitis crinium; that all the doctors have testified that alopecia areata results from unknown causes. Now, there has been testimony of Dr. [117] Levitt and I believe Melton, that shock or nervous tension or something can be one of the causes that—I believe in Dr. Levitt's testimony — I had it written up — he stated that twenty-five percent of the cases result from shock; that the other seventy-five percent are unknown. So, certainly the probabilities of negligence as against the defendant do not preponderate wherein the doctrine would come into play in this case. Further, there has been a complete failure of foundation on the question of custody, care and control of the product from the time it left our plant, and so forth, and I submit to the court that the doctrine has no place in this case and there is no direct evidence whatsoever to show any negligence, and that a motion to direct a verdict should be granted as to the defendant Arnold L. Lewis.

Mr. Lanier: Motion is resisted.

The Court: Do you want to be heard?

Mr. Lanier: Not unless the Court wants to hear me.

The Court: He makes a rather convincing presentation of his side of the case. [118]

Mr. Lanier: Well, now, then in that case, your Honor, probably I better. No. 1, the law, insofar as the inference to be drawn from no direct proof of negligence, of course, must come from North Dakota. Fortunately, that's the only case—only point—involved in this lawsuit on which we do have laws in North Dakota. This is the type of case which is well recognized and one of the reasons that res ipsa itself is well recognized, that the proof of negligence is not subject to direct proof. The manufacturer has all of the facts and elements at his control. We have none of them. It's not subject to direct proof. The mere fact that one follows the proper formula doesn't mean it was followed properly; it doesn't mean that foreign ingredients didn't get into it; it doesn't mean that the bottom of the barrel wasn't scraped in some one particular one that came out. It is not subject to direct proof, in most cases. This one, fortunately, is stronger than any other one case that, at least, appears in the book. Even the Federal case in the Fifth Circuit or Sixth Circuit, I'm not sure which it is, from which our requested instructions for res ipsa loquitar is taken verbatim. I've taken the one which was approved by the Fifth Circuit [119] and have requested it verbatim as was approved in that case. That, of course, and the fact that it should be the strength, even further than that is the fact that we have here the proof, No. 1, Dr. Michelson—I'm talking about direct proof now, while I temporarily vary off the question of res ipsa, even before we get

to that—we have the direct proof of the defendant's own doctor, Dr. Michelson, who states positively that the damage to the hair and scalp here was caused by chemical interference. He states that he does not know, and can not say, whether that chemical interference was from within the body or without the body, but he states definitely that it was a chemical interference. Now, that is direct proof of their own testimony. There is the testimony of Dr. Martin, a physician, that in his opinion, from his examination, observation and treatment, that the loss of hair was caused by the hair wave lotion and application. We have the opinion of Dr. Melton that it was caused by it. We have the opinion of Dr. Levitt that it was caused by it. We have the further testimony of practically all the doctors, except Dr. Starr, who we don't even consider to be a dermatologist, but all the dermatologists, that this type of damage does happen to hair, and the opinion of all [120] of them that it is alopecia areata. That while it comes from causes unknown—let's call it seventy-five percent causes unknown—one of those causes of course could be chemical reaction from without. Because it's unknown, it could be any of them. About 25% of the causes being from shock. The opinion of Dr. Levitt that the loss of hair to the young girl thirteen years of age was so strong and was such a shock to her, that it caused alopecia areata, and that it is permanent. Even backed up by Dr. Starr in that in young people the loss of a parent or something of that type, causing emotional upset, can and does cause alopecia areata, backed up again by their

own doctor as the actual causal thing. We have the fact, which doesn't appear in any of these other hair cases—even in the one under which it went under res ipsa loquitur, against the Toni Company—the fact that two other people using the same probable batch even of the same drug store, of exactly the same product, the pin curl wave product, also had their hair burnt short to within an inch to where it was strawy, and they had that all cut off. Now in their case, it grew back. In this case you have the additional causation which, as we know, doesn't make any difference in law, of these actions whether the results can be anticipated or not. [121] Now all of those are direct, positive proof of negligence. You also have the fact that in his original interrogatories, which is now a matter that goes to weight, that he states that the solution is five percent. Upon the breakdown, we find it's forty percent higher than that, it's seven percent. Now that's a question to be believed or not believed by the jury as to whether or not they had intended to make it five percent, but actually upon checking it themselves found out that it was seven percent. It was too high. Those are all—they're voluminous insofar as direct evidence is concerned. But now let's take the North Dakota case and presume there was none of that at all, which is completely controlling on this case. There was a case which was just about as analogous to this without using hair wave itself, as any I can think of.

The Court: What was involved there?

Mr. Lanier: Chemical for spraying crops. Now,

in that case—and I might add it is one of the cases that I put on the desk for the court——

The Court: I saw it.

Mr. Lanier: (Continuing) ——but let me get it broken down here, Burt vs. Lake [122] Region Flying Service, 54 N.W. (2) 339——

The Court: Was that put on my desk?

Mr. Lanier: Yes. Now in that case, there were some 240 acres of oats sprayed. The oats did not become even totally killed so that their production was vastly deteriorated. It was not as good a crop as the oats alongside of it. And there a chemical was used for the spraying. The testimony shows that there was utterly no evidence of toxicity or harmfulness in the chemicals used. It shows that they were used exactly in conformance with the instructions, as given out by the North Dakota Agricultural College. The product itself was a product by the name of "Weedis". Now, here is the important part of the Court's law which was decided in that case——

The Court: You wouldn't know what page you are reading from?

Mr. Lanier: Well I could give you that. I am sure I can point it out to you in just one second, your Honor.

"While there is no direct evidence of any negligence by the defendant, the circumstances were such that the jury could draw the inference that there must have been negligence by the defendant in the mixing or the application of the spray. There is no other reasonable probable explanation." [123]

The Court: This is a case in which the spray was manufactured and then put on by the same people, I assume.

Mr. Lanier: No, it was manufactured by a third party; put on by a third party. It was manufactured by one and put on by another, but the party putting it on was able to show he did it in exact conformance with the instructions issued by the North Dakota Agricultural College.

The Court: Well now wait a minute, that isn't what this says.

"While there is no direct evidence of any negligence by the defendant, the circumstances were such that the jury could draw the inference that there must have been negligence by the defendant in the mixing or the application of the spray".

That must mean that the defendant made the application also.

Mr. Lanier: Defendant did make the application, yes.

The Court: All right. Proceed.

Mr. Bradish: The plaintiff in that case didn't have anything to do with the mixing. [124]

Mr. Lanier: Now, again counsel, of course, would be talking about evidence as to whether or not we are guilty of any contributory negligence in the way we applied it. That's another problem, but the point is, the Court holds very frankly that if there is no direct evidence of any negligence, that the inference can be made, and goes on to say further——

"Circumstantial proof relied upon need not be of

a degree to expel all other probabilities and will be sufficient to submit the issue to the jury if the proof coincides with logic and reason and with that which a reasonable mind would conclude from the testimony adduced. Proof of the fact of negligence may rest entirely in circumstances—it's North Dakota law—hence, negligence may be inferred from all of the facts and circumstances in the case and where circumstances are such as to take out of the realm of conjecture and within the field of legitimate inference from established facts, a prima facie case is made."

Now, nothing could be quite clearer or quite stronger where there is no evidence of negligence, where we have at least eight separate items of direct evidence of negligence, where here there is nothing. [125]

Mr. Packard: Is that all?

The Court: What we're talking about now is the application of the rule of res ipsa loquitur.

Mr. Lanier: That is no more than the fact that when a given set of circumstances present a causation that the inference that can be made is res ipsa.

The Court: Isn't this the circumstances under which it would become applicable, and that is that when you have met all the other possible conditions that would have caused the situation, and produced evidence that the particular thing was the proximate cause, then the rule of res ipsa loquitur applies.

Mr. Packard: That's correct, your Honor. That's the point I want to argue. Let's discard the de-

fendant's testimony, let's just take the plaintiffs for the purpose of this motion. Their own evidence by their doctor shows that she was suffering from a condition known as alopecia areata which—"yes, it's true that certain"—well it's possible her condition could have been caused—but there are other causes that could cause this damage that are unknown. That's the very reason that the doctrine is not applicable because in their [126] own memorandum, this Burt vs. Lake Region Flying Service, which counsel is leaning upon, it states:

"The evidence must present more than a mere possibility that the injury occurred in a particular way", and it goes on to say, "and that such evidence is sufficient to sustain a finding of a verdict". Now, the point I am arguing to your Honor is that to permit the case to go to the jury, it would call upon them to speculate and conjecture as to just what caused the condition in this girl's hair. In other words, are they going to say, "Well I believe she lost her hair by reason of this 25%, or was it 75%? They haven't got anything to work with insofar as what caused her hair condition.

The Court: Under any circumstances, they have to find this was the cause or else they are through.

Mr. Packard: That's right. They may be able to draw certain inferences as to proximate cause, but the thing that this record lacks is the basis upon which the court can instruct the jury on res ipsa to show they met all the conditions——

The Court: We spoke of that the other day. I made the suggestion. I don't think you agreed

with it, but it was [127] made, that if all of that becomes not a question for the court, but a question for the jury to determine, whether or not it was the proximate cause, if they found that it was not, of course that would end the case.

Mr. Packard: But in this case, your Honor, this case against Home Mutual Insurance——

The Court: On the strength of the North Dakota case, I'll let it go to the jury on the doctrine of res ipsa loquitur. If we get you in trouble Mr. Lanier on that, why——

Mr. Packard: I'd like for the record to show that under the Federal Rules you have to object and if the Court is going to instruct on res ipsa loquitur, I wish for the record to show that I make an exception to that and I claim it's error to instruct on the doctrine of res ipsa loquitur.

Mr. Bradish: Now, your Honor, comes my turn. On behalf of defendant, Rexall Drug Company, it's my understanding from the court's order dismissing the first count as to Rexall Drug, plus counsel's withdrawal of certain instructions, which proceed on the theory of an [128] implied warranty, that the second count as it now stands against Rexall Drug alone, sounds in the alleged—or attempted —cause of action for breach of an express warranty.

The Court: That's what I understand to be his position. Is that right, Mr. Lanier?

Mr. Lanier: That is correct, your Honor.

Mr. Bradish: Now, again, as was done at the conclusion of the plaintiff's case, I would like to move this court for a directed verdict in favor of

the Rexall Drug Company as to the second count on the grounds heretofore stated, which I'll repeat briefly—No. 1, on the ground that there has not been established the necessary requisite privity of contract between the plaintiff in this action and the Rexall Drug Company. Such requirement for privity of contract is of course necessary under our law as our cases interpret the Uniform Sales Act relative to warranties, which Uniform Sales Act has also been adopted verbatim in the state of North Dakota, and which, according to my information is contained in the North Dakota Revised Code, 1943, at Sections 51-0116, and which is set [129] forth in our California Civil Code, starting with Section 1735. The case law to support the California interpretation of the Uniform Sales Act as it applies to warranties is the case of Briggs vs. National Industries, Inc., 92 Cal. Ap. (2) 542, and also 207 Pac. 110, and also the case of Burr vs. Sherwin-Williams Company, which is a Supreme Court opinion in this state. I think it's about 1956 or '57, cited in 42 Cal. 2d at page 682. This was a chemical spray case damage to a cotton crop.

"The general rule is that privity of contract is required in an action for breach of either express or implied warranty, and that there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale".

Now, in our case we have the situation where Rexall is the distributor of this product which they

buy in sealed packages and which I might remind the court, none of the sealed packages or the printing on the carton of the package contains the word "Rexall" in any respect or any form. There is an absence of privity of contract insofar as the plaintiff and this defendant is concerned; and, secondly, I again remind the court that there has been a failure on the part of the plaintiff to prove any express warranty made by Rexall, [130] to the ultimate consumer in this case, either by direct evidence or by any circumstantial evidence, when you take into consideration our definition of express warranty as contained in the Uniform Sales Act. The only evidence offered is a guarantee which the plaintiff claims she received at the drug-store and also a copy of which she claims she received in the package itself, which merely states that if this cold wave permanent isn't as good as any others that they have used, the purchaser can return the product and receive double the purchase price back——

The Court: Well, isn't that rather effectively a guarantee of excellence?

Mr. Bradish: I hardly would think so, your Honor—not within the meaning of an express warranty. An express warranty is an affirmation of fact made by the seller to the buyer.

The Court: Do you have the statute there that has——

Mr. Lanier: He is getting that now, your Honor. The California court has so held, I might add too, in the case of Freeze vs.—— [131]

Mr. Bradish: Well, I'll take care of Freeze vs.

Sluss now. That was a case that Mr. Packard discussed the other day. That's an opinion from the appellate department of our Superior Court, and it in no way reflects the law as expressed by our District Court, or our Supreme Court—our Appellate Department. There has been testimony by the plaintiff's mother, who is not a party to this action, that she read some advertisements in the National Farm Weekly, which listed Cara Nome products, but she did not say what she read, she couldn't recall what she read, and she couldn't recall the issue of the year in which she allegedly read it. Now, in addition to having to prove an express warranty, within the meaning of the Code, counsel must also approve reliance upon the express warranty before the plaintiff can recover on that theory of the case.

The Court: Obviously they must have relied on something because they came there with their minds made up. They were going to buy it by virtue of some——

Mr. Lanier: They got both guarantees.

Mr. Bradish: Yes, but the guarantees were obtained after they bought [132] the product, your Honor, and there was no reliance upon the guarantee.

The Court: It was at the time I would assume; it was there with the display.

Mr. Bradish: You will recall the mother testified twice that she went into the drug-store for the sole purpose of buying this Cara Nome home wave set and when she went in there she hadn't seen any

guarantee. She went in there for that sole purpose and the only evidence which would tend to establish that she had seen any warranty and relied upon any of the warranties, was the evidence that she read an ad in the Farm Magazine prior to her going into the store, and she doesn't know what the ad was and we have no evidence—the best evidence—of what the ad contains, offered in evidence in this case. She merely said she saw Cara Nome products advertised and listed, and I submit to your Honor it might be an analogous situation to an advertisement by General Motors in which they set forth the different automobiles which were manufactured and sold by General Motors and such certainly would not be considered an express warranty within the meaning of our Code Section. That is the only evidence of any expression on the part of Rexall [133] which preceded the purchase of the Cara Nome home wave set.

The Court: Do you have that statute there?

Mr. Lanier: Mr. Rourke has gone up to the library to get it.

The Court: Have you got it?

Mr. Bradish: I was going to show you in Freeze vs. Sluss, which is the case that counsel refers to, in that case the guarantee was as follows:

"Frederick-Marguerita, All Purpose Granulated Soap. Guarantee of Quality. If Frederick's granulated soap does not meet with your entire approval, your dealer will cheerfully refund the full purchase price upon return of the unused portion."

Mr. Lanier: On what ground?

Mr. Packard: All they are suing for is to get their money back. There's no personal injury there. The plaintiff is suing here to get double their money back, and——

Mr. Bradish: I repeat my initial offer to this Court. When you asked me if I had anything to state when the so-called [134] guarantee was offered in evidence, and I told you that if counsel was proceeding upon the guarantee itself and wanted double their money back, I would stipulate to a judgment in the sum of twice the purchase price of the prodduct.

(At this point Mr. Rourke returned with the statute previously referred to.)

The Court: Where did you get that—in the library?

Mr. Rourke: In the library on the second floor.

The Court: 1735, Civil Code.

Mr. Bradish: 1732 defines express warranty:

"Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty."

The Court: I saw that somewhere. Now where was it? [135]

Mr. Bradish: Section 1732 of our Civil Code. Now, your Honor, this guarantee says it's the best home permanent.

"If you don't agree that Cara Nome Natural Curl is better than any other home permanent simply mail the unused portion and container, together with a signed letter stating why you found this product unsatisfactory, to Rexall Drug Company, and we'll give you twice the original purchase price". This, mind you, is on the other side of one that has a similar guarantee for a cold remedy. Now that doesn't seem to me to be an affirmation of a fact. It's the seller's opinion as to the value of the product. Here are the boxes which I told your Honor contain absolutely nothing in the way of any warranties whatsoever and it is admitted that these boxes are not printed by Rexall. Rexall has nothing to do with them and Rexall's name doesn't appear anywhere on the box.

The Court: What I want to know is, does the evidence show anywhere how the little green guarantee got in?

Mr. Lanier: It was inside the box. By Mrs. Nihill's testimony, [136] when she purchased it, she reached in and took it out and read it.

Mr. Rourke: Before she purchased it.

Mr. Lanier: Before she purchased it, correct.

Mr. Bradish: She said—now I don't believe the evidence is that she looked at it before she purchased it, but even if she did look at it before she purchased it, the little green thing is identical to the other guarantee——

Mr. Lanier: Correct.

Mr. Bradish (Continuing): ——and her reliance, if any, must be based upon what she read before

she went into that store, because she went in there, she says, for the express purpose, sole purpose, of buying a Cara Nome wave set. So what she read in the store afterwards has nothing to do with her purchasing of that product. She went in there for that sole purpose—to buy it, and the only——

The Court: Couldn't it be that it confirmed her in her purpose? [137]

Mr. Bradish: Maybe it did confirm it, but that isn't what the Code provides. The Code provides that they rely upon the affirmation, and anything that she relied upon would have had to been displayed to her by advertising in the form of an express warranty before she went into the store. Now, the secret of the whole thing, and I think the clew of the whole thing, is when she testified that the results of the Toni were beautiful, and I asked her if the results of the Toni were beautiful why she went in for the sole purpose of buying Cara Nome. She said it was because Cara Nome had the pin curls. The pin curl type of cold wave; and I think the logical answer that can be drawn is they bought Cara Nome because it had a type for the giving of pin curls which apparently Toni didn't have.

The Court: Wasn't Toni a pin curl?

Mr. Bradish: No. Toni is a home permanent, but it's a different type. A pin curl is a separate type where they just get curls on the end.

Mr. Lanier: They have all types. [138]

Mr. Bradish: Not to my knowledge, Toni doesn't.

Mr. Packard: There's nothing in the evidence; we're all guessing.

Mr. Bradish: Nothing in the evidence.

Mr. Lanier: To show that there were other pin curls in that same store.

Mr. Bradish: I submit to your Honor that there is no express warranty here by Rexall to the plaintiff in this action or even to the plaintiff's mother——

The Court: What authorities are you relying on here, Mr. Lanier?

Mr. Lanier: I'm relying on the only one, your Honor, that's been presented to the Court—a recent case, thirty days ago, an Ohio case. My instruction offer on it is going to be worded identically as to that case. Further on that, when we're speaking of warranties, first of all you've got the advertising, you've got the testimony that in both '53 and '54 she saw the Rexall advertising; that she saw the Rexall Cara Nome advertising; that she saw even the particular paper, the Farm Journal. She makes the testimony that [139] she saw at the bottom, she said at the bottom of every one of the ads it says "You can depend on any drug products that bears the name Rexall". She said she relied upon that. That was the reason why she went there with her mind made up to get a Rexall permanent in the first place—a Cara Nome. She got there and she saw this special display, she saw this special large, Exhibit 7, on the display, took one, read it, opened the pin curl Cara Nome, looked inside of it and found inside of it the Rexall guarantee. Now she

becomes completely satisfied and relies on it again. I call the attention of the Court further that within that same box, within that same one, which she also referred to, in advertising "Cara Nome Natural Curl Permanents are Easier, Quicker, Safer——

Mr. Bradish: Your Honor, this is something put in this by the manufacturer and not by Rexall.

Mr. Lanier: It is a Rexall product. It has a Rexall guarantee within the very kit she bought. It is advertised in every bit of their own literature, in their Cara Nome pin curl; their own guarantee is opened and placed within the box. There is no question here but what they own this product and distribute it, there isn't any question on that. [140]

Mr. Bradish: Wait a minute. There is a definite question in view of the admissions of these parties in the pretrial order that this product was purchased in a sealed container from the manufacturer and was not opened, changed or altered in any degree by the distributor. What he was reading from is instructions put out by the manufacturer with this package, and to attribute that to Rexall as an express warranty seems to me to be torturing the law of warranty. An express warranty is an affirmation of fact by the seller and not by the manufacturer. Rexall had nothing to do with the preparation of these instructions, nor is there any evidence that Rexall had anything to do with placing this guarantee in the box. The only evidence is that she found it in the box, and when they attempted to get Mr. Stark to say that he seen them before, he said he hadn't ever seen

them before and, to his knowledge, Rexall didn't put them in the boxes. Now, if the independent druggists put them in the boxes, that certainly can't be charged as an express warranty to Rexall themselves.

Mr. Packard: I think Mr. Lewis testified that he did not put them in the boxes. [141]

The Court: He testified he didn't put the green——

Mr. Packard: Yes, that's right.

Mr. Bradish: And, your Honor, you will recall, I objected to the introduction of all these mats and your Honor indicated that you didn't feel that they had the necessary foundation laid to show that the lady read any of the ads which occurred in these particular mats, but you permitted them to go into evidence at Mr. Lanier's insistence, but I maintain that anything contained in these mats can not be used by this counsel as an express warranty because there's no foundation that his client, or her mother, ever looked at any of the ads that are contained in these particular exhibits.

Mr. Lanier: Counsel, both of those positions to me are ridiculous. No. 1, I have never heard anyone proclaim that when they have a product manufactured for their company, their use and distribution, exclusively, that they—when they guarantee it and put their own express warranty within the box—that they are not also guaranteeing and warrantying everything that's in that box. That's something entirely new to me. Secondly, [142] this is your advertising for '53 and '54, produced yourself—it, and all

of it. She read your advertising in '53 and '54. Now, how anyone can maintain that there is any question of admissibility on these, or that she saw ads similar to them—or these ads—and if these ads weren't there, the fact that you did advertise, the fact that she did read them and that she read what was in them, is an express warranty traveling to the bank.

Mr. Bradish: Now, just a minute. You made the statement that these were produced by us. They were not produced by us. They were produced here pursuant to a subpoena which you caused served upon a representative of the Owl Rexall. There has been no foundation. Certainly we can produce ads that we have made all over the United States, but in order for counsel or his client to rely upon express warranties, they must first prove that the warranty was made to the person seeking to invoke it; and, secondly, they must prove that that person relied upon that express warranty, and there's no foundation that any of the ads appearing in these documents were ever read by this lady, your Honor—none whatsoever. She said she read the National Farm Weekly, or whatever it is. She didn't know the month [143] or the year and she didn't know what she read other than she recalled seeing Cara Nome products advertised therein.

Mr. Rourke: And that they said "safer, faster and easier."

Mr. Bradish: They don't say "safer, faster and easier."

Mr. Rourke: That was her testimony, I don't know whether they say it or not.

Mr. Bradish: "You can depend on Rexall," now that is not an express warranty.

Mr. Lanier: Of course it's an express warranty. An express warranty of every single product appearing on that ad.

Mr. Bradish: I might cite counsel to the case of Lewis vs. Terry. It's an old case—Supreme Court case. The court held "When a tradesman sells or furnishes for use an article which is actually unsound and dangerous but which he believes to be safe and he warrants accordingly, he is not liable for injuries resulting from the defective or unsafe condition to a person who was neither a party to the contract with him nor one for whose benefit the contract is made." [144]

The Court: What is that citation?

Mr. Bradish: 111 Cal. 39. So, again, your Honor, my motion for a directed verdict proceeds on two grounds, namely, an absence of privity of contract and, secondly, that there was no express warranty made, nor any reliance on any express warranty proved by evidence. Now, counsel relies upon this recent Ohio case, which as has been indicated is a drastic departure from the general rules requiring privity, and counsel in so relying, I assume, is asking your Honor to disregard established law in California which interprets the same Uniform Sales Act as North Dakota does have, and he has no North Dakota cases interpreted, so I feel that, in the absence of a North Dakota case, in interpreting an identical statute that California has, I think the court should then follow the California inter-

pretation of the identical statute, and not go to a very recent decision in Ohio which, to my knowledge, hasn't yet been tested out in the——

Mr. Packard: That's the case which I read which indicated that the court stated they were on pioneering ground, and three of the justices, in their opinion—— [145]

The Court: Yes, I remember your discussion on it.

(Discussion off the record.)

Mr. Packard: There is a more recent case. 135 Cal. Ap. 2nd. "It may be conceded that an action upon an express warranty rests upon contract, but privity of contract is not necessary to an implied warranty when foodstuffs are involved, as here," then it cites California cases. As I read this case, just reading it, it says, "It may be conceded that an action upon an express warranty rests upon contract," and then they say "but privity is not necessary to implied warranty." So they must mean that privity is necessary in a warranty resting upon contract. That's how I read the case.

Mr. Rourke: There's a lot of implied warranty cases.

Mr. Packard: Yes, but that case, as I read it, says express warranty is upon contract, so——

The Court: That's conceded, isn't it?

Mr. Lanier: Any warranty is upon contract.

Mr. Packard: Yes, but the point is, that case says that express warranty is upon contract and they don't even discuss privity because they take it that everybody knows you have to have privity of contract if you're on express contract, and then

it says, but privity is not necessary upon implied warranty when you have foodstuffs.

The Court: Wouldn't you think that when a big company like Rexall nationally advertises its products and then gives a franchise to some little drug store to sell their products, that they go whole hog or none, that they expect them to sell as their representative or agent?

Mr. Packard: Here's the thing, your Honor. Can't you see how this Olig in North Dakota, at the Kensal Drug, North Dakota, he could come out and he could have told Nihill "Now you just take this home and you use this and if you find"—you can't possibly get hurt—I mean he can enter into his own contract. He is trying to sell the product as just a druggist.

The Court: There's no allegation of that sort. The allegation is the inducement was the advertising.

Mr. Lanier: Direct to the buyer. [147]

Mr. Bradish: Which has not been proved.

Mr. Lanier: You are arguing weight, counsel.

Mr. Bradish: I'm not either.

The Court: I'll permit it to go to the jury on the express warranty.

Mr. Packard: I would like for the record, your Honor, to show that I am withdrawing all jury instructions submitted to the Court based upon warranty insofar as Defendant Arnold L. Lewis, and I'm requesting the Court not to give any jury instructions in my behalf inasmuch as the matter has been dismissed.

The Court: I hope you will help me guard against that.

Mr. Bradish: I would suggest also, your Honor, I think that in view of your Honor's statement to the jury at the beginning of the case in which the jury was advised that the allegations alleged that Owl Rexall was guilty of negligence in failing to inspect these—test this product—that the jury now be advised that [148] issue of Rexall's negligence is no longer before them and not to be considered by them.

Mr. Lanier: I incorporated that in our Instruction 6, counsel.

Mr. Packard: I think he covered that in instructions, and we can argue that.

The Court: It shouldn't require any argument; it ought to be disabused before they start into the——

Mr. Lanier: That's why I incorporated that in the instructions.

Mr. Packard: We will have to argue it.

The Court: I think we ought to state the status of the case so far as the charges against the respective defendants before the arguments begin. Don't you think so?

Mr. Packard: Well I intend to, and I imagine counsel in his argument——

Mr. Lanier: I will be doing it and I'm sure he will.

The Court: The jury is going to be instructed too that they can't [149] take the lawyers' word for

anything, so you better let the Court do it. (Laughter.)

Mr. Bradish: Does your Honor care, for the record, and possibly for future briefs, to state whether or not your Honor is relying upon California law relative to privity of contract or upon Ohio law or upon what law insofar as express warranty is concerned?

Mr. Lanier: If the Court please, I don't think the Federal Court has to do any such thing as that.

Mr. Bradish: I didn't say he had to. I asked him if he cared to.

The Court: I don't think so. I do think that when there is no law in the state where the cause of action arises, and it's being tried in a foreign state, that the law of the foreign state should be given serious consideration, but I don't think it goes to the extent that it must control. That's what you are getting at?

Mr. Bradish: Yes, your Honor.

(Whereupon, the hearing was adjourned at 4 o'clock p.m., until 9:30 o'clock a.m. April 15, 1958, in Chambers.) [150]

Be It Remembered, that a further hearing was had in the above-entitled and numbered cause, on its merits, before the Honorable Fred L. Wham, Judge presiding, and a Jury, in the Federal Court, Federal Building, in the City of Los Angeles, State of California, on April 15, 1958.

Court convened in Chambers at nine-thirty o'clock a.m. There were present at said time and place the appearances as heretofore noted.

Whereupon, the following proceedings were had:

Mr. Lanier: Will you let the record show, Mrs. West, that plaintiff withdraws instruction request No. 4? Instruction request No. 3 is amended [151] to show sixteen year, and a life expectancy of forty-five years.

The Court: Now 5.

Mr. Lanier: That, your Honor, is taken verbatim from Burt vs. Lake Region Flying Service.

The Court: Well this would include, of course, the res ipsa rule.

Mr. Lanier: I believe so.

Mr. Bradish: It's part of it, the way it's stated. Of course, I shouldn't say anything——

Mr. Packard: I'll object to it. I think that I have probably covered it in one of my instructions.

(Off the record.)

The Court: I don't see anything wrong with it Mr. Bradish.

Mr. Bradish: I, of course, stand in no position now, in view of the dismissal as to the Owl Rexall Drug Company of the cause of action sounding in negligence. [152] I don't have any standing to object.

Mr. Packard: I don't believe that's a correct statement of the law as to No. 5, "that direct, positive evidence as to the cause of the injury is not necessary." In other words, this is a res ipsa permitting reasonable inference. They have to prove their case by a preponderance of the evidence. You say "You are instructed that it is sufficient if the evidence of circumstances will permit a reasonable

inference * * *." Our cases hold there has to be some substantial evidence.

The Court: Circumstantial evidence can be substantial.

Mr. Packard: Yes, but that isn't what it says. It says, "evidence of circumstances will permit a reasonable inference of the alleged cause of injury and exclude other equally reasonable inferences of other causes." You are having the jury here with inferences among themselves——

Mr. Lanier: You're not instructing here on burden of proof; you're instructing here on cause.

The Court: Well do you have any objection, Mr. Packard, to the [153] word "positive" rather than "direct"? Is that the term you use in California?

Mr. Packard: "You are instructed that direct evidence as to the cause is not necessary." Well, you haven't got Bagi here, have you? There's an instruction that covers that much better than this.

Mr. Lanier: That's based entirely upon the North Dakota law, your Honor, in Burt vs. Lake Region Flying Service, and is the exact language of the court in that case.

Mr. Bradish: You are not going to get anywhere trying to compare an instruction from California based upon California law with counsel's interpretation of North Dakota law, and I think that if you note your objection, that's all that's necessary. I personally feel—have a feeling—that this instruction is error, but we can't resolve all of the claimed

errors at this time, all we can do is note our objections and let the——

The Court: Well I expect to give it.

Mr. Packard: Do you want me to note my [154] objections at this time or after?

The Court: No. Afterwards, because I might change my mind if I should find something in yours that covers it better.

Mr. Lanier: No. 6 has been amended, your Honor. 6 as given in the original already in the record, so you don't have to worry with it, has been withdrawn. And we have amended 6 in there which I suppose we should go to next.

Mr. Packard: Oh, you are going to amend 6 now?

Mr. Lanier: And that takes us over to 7.

The Court: And do you think, Mr. Lanier, that 6 as amended is just the way you want it?

Mr. Lanier: Yes, it is your Honor. I've been through it carefully, insofar as general res ipsa instructions are concerned——

Mr. Packard: I think this is on the record.

The Court: Beg pardon? [155]

Mr. Packard: I would like to have whatever we have in the record on 6.

The Court: Plaintiff's amended instruction 6 is under discussion.

Mr. Packard: And I believe the Court asked counsel whether he thought it was adequate as it is set forth.

The Court: Now, let me make a statement here, before we go on, so as to get my idea. Over on page 1, down toward the bottom of the page, I couldn't

quite follow the language down there. Now let's read it—"If you should believe from the evidence in the case——" I don't think you need to take what I say.

(Discussion off the record.)

The Court: Now, then, do you want to state your objections? Do I understand you want to state them now or later?

Mr. Packard: I'll do whatever the Court tells me to do on that. [156]. I want the record to show at this time that we are now discussing the instructions in Chambers and that I object to any instructions being given to this jury on the doctrine of res ipsa loquitur, as there has been no proper foundation laid for the use of said doctrine and it's not applicable in this case because there has been a failure on the part of the plaintiff to exclude, or introduce, any evidence which will exclude the other causes that could have caused this condition of alopecia areata which they own doctors testified to, and that two of their own doctors have testified that the cause of alopecia areata is unknown and their third doctor, Dr. Levitt, testified that in twenty-five percent of the cases you would expect to find shock and in the remaining cases it's unknown and therefore the probabilities do not tend to show or weigh in favor of the plaintiff that the cause was some negligence on the part of the defendant——

Mr. Lanier: Counsel, I wonder—I don't want to interrupt you now on these — but probably these things could take all day. Can't we just make our exceptions to the instructions? None of these are going to mean a thing anywhere else. [157]

The Court: Well, let him make his record. I think it's all right, and upon such objection being stated by Mr. Packard, the court announced that the instruction relating to the rule of res ipsa loquitur would be given.

Mr. Lanier: That takes us to instruction request No. 7 on the original.

(Discussion off the record.)

Mr. Lanier: Now 8 is already in the record, is withdrawn, and amended 8.

The Court: You have no objection to that second paragraph, have you Mr. Bradish?

Mr. Bradish: I most certainly have objection to the second paragraph because the second—you better take this—the second paragraph goes to the basis of my objection yesterday, and that is based upon a recent Ohio case which apparently ignores the——

Mr. Lanier: He is talking about the second paragraph. [158]

Mr. Bradish: Oh, the second paragraph. I have no objection to that, but the rest of it I do. I think the third paragraph doesn't properly state the law and I have requested two sections of the Uniform Sales Act verbatim.

Mr. Packard: May I, as a friend of the Court, inasmuch as I am not involved in the warranty, point out the vices of the third paragraph—that is if your Honor gave this instruction, you are instructing the jury that there was a written warranty. In other words, you are passing upon a question of fact which this jury has to pass upon,

when it says, "or in the written warranties delivered to the purchasers with the product." In other words, you are implying that a written warranty was given to the plaintiff I think by giving that instruction.

Mr. Bradish: And by written warranties is included the instructions for the use of the Cara Nome set which by the admissions in the pretrial order have no bearing upon Owl Rexall. Owl Rexall didn't make them, they didn't put them in the box; they had nothing to do with any [159] warranties that might have been contained in these instructions in the use of the Cara Nome set.

Mr. Lanier: If the Court please, the whole paragraph is prefaced with the fact of whether or not the jury finds. The entire question of their finding, whether there was any advertising, whether there was any guarantees within that advertising or in the written warranties delivered to the purchaser with the product, and if it made representation as to quality and merits. Now, I can see one possible thing counsel is talking about which I would have no objection to——

The Court: Before you go on with that, let me suggest the insertion after "liable" in the first line of the third paragraph, the words "under Count II of the Complaint." Otherwise submit the entire thing to the jury on that. Now you can go on Mr. Lanier.

Mr. Lanier: Well now then that part, that change is fine with me, your Honor, and I'm only thinking about counsel, and also again, so there won't be

any possible misunderstanding of these instructions "or in the written warranties delivered to the purchasers with the product [160] if you find such warranties were delivered with the product," I have no objection to putting that in.

Mr. Bradish: I think when you use the word "warranties," we are exceeding the province of the jury to determine whether or not any statements made amounted to a warranty as defined by the Uniform Sales Act. If you say in its advertising or in any guarantees in said advertising——

Mr. Lanier: Let's change the word "warranties," your Honor, which I am perfectly willing to do, and I think it may be a point well taken, to "written guarantees."

Mr. Bradish: You have already gotten that. May I suggest that you start with the word "or," and delete that over to and including the word "product." If you just say "Rexall Drug Store, in its advertising, or in any guarantees in said advertising, has made representation as to quality and merits of its products."

Mr. Lanier: Now, let's see, "or in any written guarantee delivered to the purchaser with the product if you find they were so delivered——" [161]

The Court: What about this "written warranties"?

Mr. Lanier: That we have changed, your Honor.

The Court: Have you taken it out? It was suggested, but I never heard any response.

Mr. Lanier: That paragraph will read—"To hold

the defendant, Rexall Drug Company liable under Count II of the Complaint——"

Mr. Bradish: Didn't you want to remove the word "liable," Judge?

The Court: No.

Mr. Lanier: (Continuing) "——you must find that the defendant, Rexall Drug Company, in its advertising, or in the guarantees in said advertising, or in any written guarantees delivered to the purchasers with the product, if you find such written guarantees were delivered with the product, has made representation as to quality and merits of its products aimed directly at the ultimate consumer," and so forth. [162]

Mr. Packard: At the end it says "and thereby suffers harm in the use," should be "and thereby suffers damages as the proximate result of the use of said product."

Mr. Lanier: I have no objection to that either. I am perfectly willing to insert that.

The Court: Now read the whole paragraph.

Mr. Lanier: "To hold the defendant, Rexall Drug Company, liable under Count II, you must find that the defendant, Rexall Drug Company, in its advertising or in the guarantees in said advertising or in any written guarantees delivered to the purchasers with the product, if you find such guarantees were delivered with the product, has made representation as to quality and merits of its products aimed directly at the ultimate consumer and urges the consumer to purchase the product from a retailer, and such ultimate consumer does so purchase

in reliance on and pursuant to inducements of the defendant, Rexall Drug Company, and thereby suffers damage as a proximate result of the use of said product." [163]

Mr. Bradish: Well, your Honor, I have to object to it because it says "or in any written guarantees delivered to the purchasers with the product." Now counsel is going to rely, I know, upon these instructions in the Cara Nome set itself, which were not placed there by Rexall. Rexall had nothing whatsoever to do with them, and he is going to rely on the fact that that is a written guarantee delivered with the product, and if the jury is entitled to use the language in these instructions "delivered with the product," which Rexall had nothing to do with, they are permitted to find against Rexall on an express warranty which counsel will admit and has admitted, in the pretrial order, was never made by Rexall.

The Court: Who put the green guarantee in it?

Mr. Bradish: I don't know who put that in there.

The Court: Lewis says they didn't.

Mr. Bradish: Well, Rexall says they didn't either. I'm not talking about the green guarantee, I'm [164] talking about these instructions that go with the Cara Nome set which, admittedly, were not placed there by Rexall and had nothing to do with Rexall.

Mr. Packard: I think, your Honor, I think that it would be error to give this instruction stating "or in the guarantees in said advertising, or in any written warranties," because I think it implies that

there were guarantees and there were warranties, but I think if it just said "in its advertising has made representations as to quality and merits of its products." If you will strike out those two sentences, you will have it, "To hold the defendant, Rexall Drug Company, liable under Count II of the Complaint, you must find that the defendant, Rexall Drug Company, in its advertising, has made representation as to quality and merits——"

Mr. Lanier: I would never change the request that way.

The Court: All right, let's go on to the next instruction.

Mr. Bradish: Does your Honor care to indicate—— [165]

The Court: I'll get it.

Mr. Bradish: I just might mention one other thing. The instruction, in my opinion, is improper in that it refers to advertising to ultimate consumers but it doesn't set forth that the person claiming to have been damaged by reason of the breach of the express warranty has read the advertising and has relied upon it. We're concerned with the party claiming here and not the ultimate consumers in general, as the instruction——

The Court: What do you say, Mr. Lanier?

Mr. Lanier: It says in there—"* * * does so purchase in reliance on." You can't purchase in reliance on without having read——

Mr. Bradish: "and urges the consumer to purchase the product from a retailer." The consumer—he's talking about the general consumer.

The Court: By the ultimate consumer here, do you mean Sandra Nihill? [166]

Mr. Lanier: Your Honor, I don't think it makes any difference, because I think the same reliance is in operation.

(Off the record.)

Mr. Bradish: We have made the record. I will object to it again at the proper time. I think it's error; we are not going to resolve any problems here. You are going to give No. 8 as amended?

The Court: That's right.

Mr. Bradish: My objection will be noted at the proper time.

Mr. Lanier: And that goes to 9, and 9 and 10 have already been withdrawn in the record. That leads us to 11

Mr. Packard: Your Honor, on 11—does your Honor have 11?

The Court: I do have it.

Mr. Packard: Now, your Honor, I have no objection to 11, but I believe that is the instruction I was looking for in Bagi, which I stated would cover Jury Instruction No. 5. [167] I believe 11 should be given in lieu of 5.

The Court: What do you say about that Mr. Lanier?

Mr. Lanier: That's all right. I'll withdraw 5, your Honor. Let the record so show.

The Court: What about 12? Given.

Mr. Lanier: Now 13, your Honor, I give only for the benefit of the Court. As counsel has read it, I think that it is a correct statement, by way of

introduction. The Court may change it a million ways, I don't know; that's certainly up to the Court to state what the case is about.

The Court: I notice over on the second page, I don't think you want to refer to Count I so far as Rexall is concerned—"that the defendant, Rexall Drug Company, was negligent," that shouldn't be in there, should it?

Mr. Lanier: That should be probably that the defendant, instead of Rexall Drug Company, that the defendant Studio Cosmetics—— [168]

Mr. Bradish: I think you ought to strike any reference to Rexall Drug as being negligent in distributing said product and advertising and selling——

The Court: We'll take that out—mark it out.

Mr. Packard: I object to it; I think it's misleading.

The Court: I'm not putting your name in either.

Mr. Packard: I think it's somewhat misleading because it sounds like the Court is commenting on the evidence and summing up the evidence for the jury.

The Court: Well, suppose you leave that to me and you can make your objection later.

Mr. Packard: Okay, I was just pointing out. I think a lot of times if you go through what all the allegations of the complaint are and so forth, some of the jurors may get the idea that this is a comment by the Court upon what the evidence is in the case—— [169]

The Court: We'll probably get back to this in a fashion after we look at yours.

Mr. Lanier: 14. Counsel, I presume there is no objection to it, is there?

The Court: I marked out the "s" after defendant, in the fourth line from the bottom and I didn't quite understand the reach of the words "or both" down there in the next to the last line.

Mr. Bradish: I don't either.

Mr. Lanier: You have to start it out with a verdict against "either or both defendants," "if you find against either, or both, it will then be your duty—and only then—to award the plaintiff such amount of damages as will compensate her reasonably, and so forth.—Or the breach of warranty, if any," or both—it's "one or both."

Mr. Bradish: I think when you say "the breach of warranty——" [170]

The Court: "Any breach of warranty," I think.

Mr. Bradish: Breach of warranty, if any.

The Court: Yes, that's right. I think "if any" should properly go in after "warranty."

Mr. Lanier: Well now if we're going to do that, of course then after the "negligence of the defendant Studio Cosmetics Company, 'if any,'" should also go in.

The Court: Back home we always put that "if any" in there. All right, what's the next one?

Mr. Lanier: 15.

Mr. Bradish: I have serious objection to this. This presupposes lots of evidence that we haven't heard. We haven't had any evidence about any

hospital bills, past or future, and we haven't had any evidence of any expenses to be incurred in the future, and loss of income in the future, we've had no evidence whatsoever concerning that. [171]

Mr. Lanier: Counsel is not subject to evidence at any time where you have a minor.

Mr. Bradish: Well, I strongly disagree with you.

Mr. Lanier: You have testimony in here on the way the girl has been disfigured. That disfigurement can be taken, by way of inference, as to how it is going to effect her future income.

Mr. Bradish: You've got to have some testimony.

Mr. Lanier: You don't have to have a bit of testimony on a minor. She has no scale upon which to go.

Mr. Bradish: I have registered my objection, your Honor, for the record.

Mr. Packard: I join in the objection.

The Court: I'll give it as written.

Mr. Bradish: Including hospital bills? [172]

The Court: No. I'll take that hospital bills out of there.

Mr. Lanier: Taking the words "and hospital bills" out?

The Court: Yes.

Mr. Bradish: Are you going to give "future doctor bills"? It seems to me that it will be a little inconsistent with your theory that this is a permanent condition and no future medical attention will do anything to alleviate it, and then tell the jury——

Mr. Lanier: He may have a point there, your Honor.

The Court: Take out doctor bills. I'd leave it all out I believe.

Mr. Lanier: "you may take into consideration pain and suffering"—leave the whole doctor and hospital bills, past and future, out of it. Just scratch it out.

The Court: Okay, so amended. The next has to do with the form of the verdict.

Mr. Lanier: Which will be changed according to the form you actually [173] give them I presume, your Honor.

The Court: The forms of verdict were amended and they were presented. Did you see those?

Mr. Packard: Did the Clerk prepare those?

The Court: Yes. There's one form to find both guilty and one form to find neither guilty; one form to find one and the other one not guilty; one form to find the other one guilty——

Mr. Bradish: They look all right, Judge.

The Court: Let's turn to Mr. Packard's requests.

Mr. Bradish: We had one we were going to return to—No. 7.

Mr. Lanier: We couldn't find Bagi on that now. I think we better get 7 decided on.

The Court: The question raised was whether you have proven adequately, to be submitted to the jury, the matter of inherently dangerous drug. [174]

Mr. Packard: Yes, there's no proof that there should be warnings given of this particular drug. There isn't any evidence that, used in certain con-

centrations, that it's inherently dangerous. This is not a product that is inherently dangerous.

Mr. Lanier: Our position on that, your Honor, and the reason we want the instruction, is because of the fact that any time you have testimony of toxicity you have an inherently dangerous substance.

Mr. Packard: We gave instructions as to proper use and that's the point your Honor. It says, "That duty is to exercise ordinary care to the end that the product may be safely used for the purpose for which it was intended and for any purpose for which its use is expressly invited——"

Mr. Lanier: It's just like a weapon, your Honor. Properly used, it's not dangerous, but it still is an inherently dangerous weapon.

Mr. Packard: I submit that there is no evidence to show the product [175] was inherently dangerous and it would be error to give the instruction.

The Court: Maybe so. I'll give it. Now, we'll go to yours. On the whole, they look like a pretty good set of instructions. There's so many of them. Well, the first one I marked to give is No. 1, that Lewis is not an insurer or guarantor.

Mr. Bradish: I think that properly would apply to Rexall also. If you could change it to read that "the defendants"——

Mr. Lanier: No, I would resist that completely, your Honor, because the breach of warranty is not based upon negligence.

Mr. Bradish: This doesn't say anything about negligence.

Mr. Lanier: But it's a negligence instruction. You are talking about "insurer." When you give a guarantee you are an insurer.

Mr. Bradish: Let's get on the record then. Insofar as Instruction No. 1, requested by defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, I request [176] the Court to give the instruction to include therein the defendant Rexall Drug Company as a defendant who requested a similar instruction, and I request the Court to insert by interlineation the name "Rexall Drug Company" and change it to read "You are instructed that the defendants."

The Court: I want to raise a point there. I read that first sentence over a time or two, and it somehow doesn't quite ring—"You are instructed that the defendant—Arnold L. Lewis—you don't need to take what I say, except when I tell them I'll give the instruction, because I might change my mind.

(Off the record.)

Mr. Lanier: Just let the record show an exception to Defendant's No. 1.

Mr. Packard: I'll withdraw No. 1. I think I have some others.

The Court: All right, No. 2.

Mr. Packard: I'll withdraw this No. 2. Now 3.

Mr. Lanier: We have no objection to that. [177]

Mr. Bradish: I would like to have Rexall added to that. "By reason of any act or omission on the part of the defendant, Arnold L. Lewis, or any breach of warranty on the part of Rexall."

The Court: Any objection to that, Mr. Lanier?

Mr. Lanier: Now, how did you want to do that?

Mr. Bradish: "It will be your duty to find that the condition was not caused by reason of any act or omission on the part of the defendant, Arnold L. Lewis, or any breach of warranty on the part of Rexall."

Mr. Lanier: I have no objection to that.

The Court: No. 4.

Mr. Lanier: No. 4. I don't object to either, your Honor.

The Court: That goes to both?

Mr. Bradish: Yes, as worded, it does. [178]

The Court: All right.

Mr. Bradish: I think No. 5 if you just put the word "defendants" instead of "defendant."

Mr. Lanier: I have no objection to that instruction. The next one I do object to, your Honor, because there is not an iota of testimony in this record of any allergy.

Mr. Packard: I'm willing to strike out the words "or allergy" because I agree with counsel. I'm not going to claim there is an allergy.

The Court: I have it marked "not give" because it's a repeat. Now, then, No. 7. That goes for both defendants.

Mr. Lanier: That, of course, is completely out of res ipsa loquitur. You are getting entirely away from res ipsa.

Mr. Bradish: Since the theory of this case is, on the part of the defendants, that the doctrine of res ipsa loquitur is not applicable, I think in order to support the [179] defense theory, that this in-

struction should be requested. Now, if your Honor wants to refuse it, that's another thing. We feel of course the doctrine of res ipsa loquitur is not applicable here. And if it is not applicable then this instruction is proper.

Mr. Packard: I may state, your Honor, that it is error to give this instruction if the doctrine of res ipsa loquitur is applicable, but I feel that the doctrine is not applicable, so therefore insisting on the instruction.

(Off the record.)

The Court: I won't give it, in view of what you've said here.

Mr. Packard: Do we have to except to the fact you don't give them, or are they deemed excepted?

The Court: You will have to make your exceptions at the end if you want some instructions given that I haven't given, and——

Mr. Packard: Why can't we stipulate if we make our objections in chambers here, they may be deemed—I think it will save a lot of time. [180]

The Court: It takes away from the Court all flexibility of thinking between now and the time the instructions are given. All right, let's go on to No. 8.

Mr. Packard: No. 8, I'll withdraw.

The Court: No. 9.

(Off the record.)

Mr. Packard: I think No. 10 covers probably the same thing. I want one or the other, but I think—I'll withdraw 9 if the Court gives 10.

Mr. Lanier: If No. 9 is withdrawn, I do not think I will have any objection to 10.

Mr. Packard: All right, I'll do that, and I will further stipulate, your Honor, that wherein you give the instructions on behalf of both defendants, you may strike "Arnold L. Lewis, doing business, etc." I think if you just put "defendants," I think it will be much easier to instruct that way. [181]

Mr. Bradish: For both defendants.

The Court: No. 10 given as amended. Now No. 11. That's good for both, isn't it?

Mr. Lanier: We have no objection to that instruction, your Honor.

The Court: All right, 12?

Mr. Packard: I'll withdraw this. The Court has, as I understand, ordered a dismissal to the second cause of action as against Lewis, so I will withdraw this.

The Court: All right. 12 withdrawn.

Mr. Packard: 13 I'll withdraw; withdraw 14; 15 withdrawn; 16 withdrawn. I think 17 is a correct statement.

Mr. Lanier: I have no objection to 17.

The Court: 17 given. 18.

Mr. Lanier: It's repetitious, your Honor. [182] I have no objection to the instruction itself. It goes back to the last one before that, I think one or the other of them should be withdrawn.

Mr. Bradish: This goes to the contributory negligence. The other one goes to the burden of proof.

Mr. Lanier: I think you might be right, counsel; it's somewhat repetitious, but we have no objection to it.

The Court: Give them both. The next one is 19. I have "not give" for some reason.

Mr. Packard: I'll withdraw 19; withdraw 20 and I'll withdraw 21.

Mr. Bradish: Wait a minute. I certainly would want that to be given. I discussed this with your Honor a few days ago and asked——

Mr. Lanier: I think it's a proper instruction, your Honor.

The Court: I think it is too. I have it marked "give."

Mr. Packard: Let the record show it has been withdrawn on behalf of Lewis. [183]

Mr. Bradish: And I have requested it on behalf of Rexall.

(Off the record.)

Mr. Packard: I'll withdraw 22.

Mr. Bradish: I think it should be given because it explains Section 1732, parts of it.

The Court: You have some instructions there, we'll get to them.

Mr. Bradish: If you change the words "made to her by the defendant, Rexall Drug Company, were merely affirmations as to the value of the cold wave solution or expressions of his opinion of the cold wave."

The Court: Denied. 23?

Mr. Packard: I'll withdraw 23.

Mr. Lanier: No objection to 24; 25 I have no objection to; 26 no objection; 27 no objection; 28 no objection; 29—— [184]

The Court: Wait a minute. You're going too fast.

Mr. Lanier: Let's go back to 24 then and let's see where we are.

The Court: 24 was given. 25 was given; 26 given; 27 given; 28 given.

Mr. Lanier: 29 no objection; 30 we have no objection to.

Mr. Bradish: Are these all going to be given, your Honor?

The Court: Well I've got to study them a little bit. I haven't had time to figure out what is necessary and what is not. I don't see any fault in them, I'll say that, and it might be Mr. Packard that if you will go through those, you might indicate to me what ones you want to be given.

Mr. Packard: These are all just standard.

Mr. Lanier: 31 I have no objection to.

Mr. Bradish: I think they ought to be given unless counsel has [185] some specific objection to any one of them.

Mr. Lanier: 32 I have no objection to. 33 I have no objection to; 34 I have no objection to; 35 I have no objection to. 36 I have only this objection, your Honor. I think the words should be written in there "his or"—his or her testimony, and the same thing in the next to the last line should be "of truth favors his or her testimony." The same thing is true in the last line of 37. It should be "by him or her" on that point.

The Court: I don't see anything to be gained by giving 37.

Mr. Packard: I certainly want 37.

Mr. Lanier: Yes, I want that one too, your Honor.

The Court: Okay.

Mr. Bradish: Again, I'm right in the middle.

Mr. Lanier: Of course I certainly want 38 too. I think it's necessary in this case. [186]

Mr. Packard: I'll withdraw 39. When you prepare the instructions you never know what the testimony is going to be.

Mr. Lanier: And 39 is withdrawn, right?

Mr. Bradish: 40 is expert testimony.

Mr. Lanier: It's already been requested and given in mine. I think if you just withdraw it, it will save a lot of trouble for the Court.

Mr. Packard: I'll withdraw 40.

The Court: What about 41?

Mr. Lanier: As a matter of fact, there isn't a hypothetical question in this case, your Honor.

Mr. Packard: Oh, yes, I asked this guy, "assume there was a solution; that thioglycolate was in the normal limits and assume there was no skin irritation" — I asked Jeffreys that — assume that — I asked him that question.

The Court: Well that's good law anyway. [187] I think I'll give it.

Mr. Lanier: Yes, it's good law. I have no question about that; there isn't any doubt about that.

The Court: Now the next one, 42. I thought it was a little complicated.

Mr. Packard: The only thing I'm thinking, your Honor. I would like to have this given from the standpoint that there's certain history given she

had a cold wave solution. And that's hearsay insofar as the doctor is concerned.

The Court: It doesn't make any difference because it's true, isn't it?

Mr. Lanier: But you see that's not the purpose of this instruction with your medical. The purpose of this is where a witness comes into a doctor and she says "Oh, doctor, I——"

Mr. Packard: I'll withdraw it.

Mr. Lanier: I have no objection to the next one, but I don't see much value to it. [188]

Mr. Bradish: 43?

Mr. Lanier: 43, yes. I have no objection to it. I think that 44 is out under the other instructions. That's just going to confuse the jury because you definitely told them you can only hold one defendant under one and the other one under the other.

Mr. Bradish: I don't think so. This instruction tells them that each defendant is entitled to a fair consideration of his own defense.

The Court: I'll give 44. Now what about the definition of "negligence"? I think if you give 45 and leave 46 off, you can give the shortest one and it will probably be just as effective.

Mr. Bradish: I think that's all right. With me, it is because I'm not involved in negligence.

Mr. Lanier: Now which is which?

The Court: 46 is the second one on negligence.

Mr. Packard: I'll withdraw it. [189]

Mr. Lanier: Is 45 being given, your Honor?

The Court: Yes.

Mr. Packard: 47 I'm insisting upon. It's a correct statement of law.

(Off the record.)

Mr. Packard: I insist this is a correct statement of the law. I think this is a proper instruction, your Honor.

The Court: I think I'll give it, Mr. Lanier. 48 now. Gentlemen, I have a feeling—right now it's eleven o'clock, that if the jury were permitted to go and come back at one-thirty, then there wouldn't be any interference with your arguments.

Mr. Lanier: Would one be too early for them?

The Court: I want to get through here. We've got to go over Mr. Bradish's instructions yet. [190]

Mr. Lanier: Certainly we're not going to get any argument started this morning.

The Court: No, I don't see how we can. (Addressing the Clerk:) Suppose you have them brought in and I'll make that announcement from the bench.

(Whereupon, the Court, reporter and clerk proceeded to the courtroom, where the following proceedings were had:)

The Court: I assume the members of the jury think there is a lot of idleness going on about this case, but it isn't true. We have been working awful hard in there. There's a good deal of work to be done in getting a case ready to be presented to the jury after the evidence is all in, and we aren't through yet. I brought you in so you could have an opportunity to separate until one-thirty, and we are hopeful by that time not only to have our problems ironed out, but to get our lunch too and be back

here at one-thirty and hear the arguments in the case at that time, so if you will withdraw at this time under the same injunction heretofore given, not to talk to [191] anybody about the case or let anybody talk to you about the case, or not to try to determine in your own mind what the outcome should be until you have heard the arguments of counsel and the instructions of the Court. You may go now and come back at one-thirty. The bailiff may take the jury.

(Whereupon, the Court, reporter and clerk returned to Chambers, for resumption of instructions discussion.)

The Court: All right. 48 given as amended. 49.

Mr. Lanier: 49 is objected to, your Honor, on the grounds I've already given, that ordinary care is not the care incumbent upon the manufacturer of the product and unless it's compared to people in like field, like products, but here again, this is repetitious.

The Court: We have one like that.

Mr. Packard: No, this your Honor is just a definition, that's all, of ordinary care, isn't it?

The Court: Isn't the other one? [192]

Mr. Packard: Which other one?

The Court: There's an earlier one.

Mr. Packard: There is one on negligence. I have never tried a case that this instruction hasn't been given, except a common carrier.

Mr. Bradish: It seems to me that this instruction favors your side of the case in that it applies to contributory negligence as well as negligence.

Mr. Packard: Are you going to give 49?

The Court: Yes.

Mr. Packard: Withdraw 50.

Mr. Bradish: 51 is just a——

The Court: Definition of contributory negligence. I've got it marked to give. [193]

Mr. Lanier: Now, there is only one objection that I have to that as given, your Honor, without anything further, and that is that along with that instruction, which I think is proper, should be given the fact that the burden of proof, proving that contributory negligence is on the defendant. Now if there is another instruction here on that.

Mr. Packard: As a matter of fact, there are two instructions I ordinarily always submit, but have not been submitted because when I prepared these instructions I didn't know how I was going to prepare in that I had negligence and warranty tied in, and that was 113 and 116 of Bagi on burden of proof.

The Court: Is the rule of evidence in North Dakota that contributory negligence must be proved by the person seeking it? Is it part of the case for the plaintiff or part of the case for the defendant.

Mr. Lanier: Part of the case of the defendant. He has the burden of proving it, according to the evidence.

(Off the record.) [194]

Mr. Lanier: If this instruction is to be given, this instruction standing alone is not proper unless the additional sentence is added to it that the burden of proof——

The Court: Let me ask you directly, and before we go on, where is the burden of proof on contributory negligence?

Mr. Bradish: In North Dakota, I don't know. In California, the defendant has the burden of proving by a preponderance of the evidence that the plaintiff was guilty of contributory negligence.

Mr. Lanier: The same in North Dakota.

The Court: You pleaded contributory negligence.

Mr. Bradish: Contributory negligence has been pleaded but this instruction is perfectly correct law. Now, if counsel wants the jury instructed that the burden of proving is on the defendant he should have requested such an instruction because contributory negligence is set up in the answer, and that's one of the issues. [195]

Mr. Packard: This is covered in Bagi 21 and it says—"In Civil Action, the party who asserts the affirmative of an issue must carry the burden of proving it." In other words, the burden of proof as to that issue is on that party. Then it goes on to say "Your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue." Now, we're asserting the affirmative of contributory negligence, so I think Bagi No. 21 covers the burden of proof.

Mr. Lanier: Not to a jury, it doesn't cover it.

Mr. Packard: We can argue it. This doesn't have to do with burden of proof, this instruction. It's just a statement of the law of contributory negligence.

Mr. Lanier: If it's going to be given, then it

should be given at the same time also stating that the burden of proving the defense of contributory negligence——

The Court: If you want that instruction, Mr. Lanier, you might submit it. I don't mind if you submit it in longhand as far as I'm concerned. [196]

Mr. Lanier: All right, your Honor, I shall do.

The Court: 52. That's a definition of "proximate cause"; it seems all right to me.

Mr. Lanier: No objection.

Mr. Bradish: Now this Instruction No. 53, again goes to an inconsistency between this instruction and the doctrine of res ipsa loquitur, and if your Honor feels that res ipsa loquitur applies here, you should refuse this instruction because it would be error to give it.

The Court: I'll refuse it.

Mr. Bradish: 54 I think is good law.

Mr. Lanier: I have no objection to 54.

The Court: Given.

Mr. Bradish: 55. [197]

Mr. Lanier: 55 I think should be given.

The Court: Now, then.

Mr. Lanier: I have no objection to 56.

The Court: 57—let's take a look at the last two lines.

(Off the record.)

The Court: 57 given. Now 58.

Mr. Lanier: Of course, I object to that one, your Honor, because there's no testimony here of pre-existing injury.

(Off the record.)

Mr. Packard: I'll withdraw 58.

Mr. Bradish: 59, the last one.

Mr. Lanier: Well, now that last instruction, your Honor, I have no objection to except that if that instruction is going to be given, it should be given both ways. "I, of course, do not know whether you will need the instructions [198] on damages, and the fact that they have been given to you must not be considered as intimating any views of my own," and I would like an insertion in that, your Honor, if it is going to be given, "one way or the other" on the issue of liability or as to which party is entitled to your verdict.

Mr. Bradish: Well, it seems to me the Court will take judicial notice.

The Court: What are you going to with that "I, of course, do not know whether you will need the instructions," do you want that in there?

(Off the record.)

The Court: 59 given as amended.

We have on the tail end of this thing some instructions requested by Mr. Bradish.

Mr. Bradish: Your Honor, my instructions as presented were not numbered.

The Court: I've numbered them. I didn't know how else to get at it so I could make a note of what I thought about them. [199]

Mr. Bradish: All right. You started with 1, did you?

The Court: Yes.

Mr. Bradish: All right. Your last one here is

No. 20. So those two that I presented this morning, will you make those 21 and 22?

The Court: Yes, what became of those?

Mr. Bradish: I gave them to the clerk. Make those 21 and 22.

(Off the record.)

Mr. Bradish: I'll withdraw No. 1, your Honor.

Mr. Lanier: Of course that No. 2 we object to.

Mr. Bradish: I certainly don't know why.

Mr. Lanier: Because they gave an express warranty, they are an insurer.

Mr. Packard: I withdraw my No. 1, your Honor.

Mr. Bradish: They are not an insurer. By giving an express warranty, you don't insure the safety of the public in using a product. An express warranty is to the value of it and to induce them to buy it. You certainly aren't an insurer of the safety of the public by making a warranty unless the express warranty absolutely states that you are insuring their safety in the use of this——

Mr. Lanier: We don't have to show any negligence. All we got to show is that's what caused it. Negligence becomes moot entirely.

Mr. Packard: Your Honor, I never did get my instruction that we're not an insurer in here. I withdrew that No. 1——

The Court: I thought you said it was covered somewhere else.

Mr. Packard: I thought it was, but it wasn't.

The Court: Well, you are entitled to it. [204]

Mr. Packard: And I feel like No. 1, we can go back—I hate to do this—to my No. 1, which is the

same as his No. 2, and I withdrew it, and I am going to ask to be relieved of my stipulation to withdraw it and I am going to still request my No. 1, which reads:

"You are instructed that the defendant, Arnold L. Lewis doing business as Studio Cosmetics Company, is not an insurer or guarantor of plaintiff's safety." I changed "condition" to "safety." "The duty of care imposed upon the defendant is not absolute, such as the liability of an insurer would be, but it is only his duty to use ordinary care under the circumstances." I think that's a proper instruction.

The Court: I think so.

Mr. Packard: May the record show that my No. 1 will be given?

The Court: Yes. Now, then, your No. 2, Mr. Bradish.

Mr. Bradish: It's the same thing except that it's greatly minimized.

The Court: I'll give it. Now then I will deny 3.

Mr. Lanier: Now, that, I have given as "no," your Honor, because of the phrase in there "however slight," which implies the tiniest little eenie bit——

Mr. Bradish: Contributory negligence is negligent in any degree.

Mr. Lanier: "In any degree" I have no objection to. The wording "however slight" has been held error in my State.

Mr. Bradish: Do you want to change "however slight" to "in any degree"?

Mr. Lanier: "In any degree" I have no objection to because that is the wording.

Mr. Bradish: We can argue "however slight," because if it's any degree it might be one degree.

Mr. Lanier: I think you can argue it.

Mr. Bradish: You better change this one though because I'm not interested in negligence anymore.

Mr. Lanier: I don't think this applies, of [203] course, to this defendant at all.

The Court: That's the reason I had it marked "not give."

Mr. Lanier: Is that withdrawn?

Mr. Bradish: No, he just refused it. (4)

The Court: 5 will be refused to. 6 will be given.

Mr. Lanier: I have no objection to 6.

The Court: 7 not give that. That has to do with negligence. 8 not give. Now, then No. 9.

(Off the record.)

The Court: I will refuse 9.

Mr. Lanier: That, of course, again, your Honor, just isn't the law. It's their product——

Mr. Bradish: It is not our product. [204]

Mr. Lanier: It certainly is. You have the franchise for this product. It's made exclusively for you. It's sold through your chain; you're responsible for it. It's incorporated in your advertising. It's incorporated in your guarantee——

Mr. Bradish: It is not a Rexall product and you certainly can't be sincere if you state that we're responsible for the product, outside of a breach of any express warranty.

Mr. Lanier: And when you put your guarantee

with it and you advertise it as a Rexall product, which it is, and which the testimony shows, then of course you're responsible for your own guarantee —and your own warranties.

Mr. Bradish: We're responsible for breach of any warranty that we make concerning it within the definition of warranty and we're responsible for our guarantees to the extent of the guarantee. A guarantee is a contract. This is the correct law. If you——

The Court: I will refuse 9. Now 10. [205]

Mr. Lanier: Of course, I think that applies to negligence.

Mr. Bradish: No, it does not apply to negligence. It applies to representations made in connection with the sale of goods, and what representations the druggist made or what representations are made in the directions furnished by the manufacturer, are not the representations of Rexall.

Mr. Lanier: Your own exhibit in evidence, counsel, shows the relationship with the drug store, the fact that they have to buy your product, the fact that they have to sell so much of it and so forth.

Mr. Bradish: That doesn't say they can't sell other products.

Mr. Lanier: No.

Mr. Bradish: Would you say that a representation made by the druggist of something that wasn't Rexall products would—the man would still be an agent of Rexall?

Mr. Lanier: No, I would not, but when Rexall

itself makes an [206] express warranty this instruction is completely contrary to law.

Mr. Bradish: This doesn't say Rexall's express warranty, this says, "any representation made by Studio Cosmetics."

Mr. Lanier: When you put your guarantee within that package, counsel, and put it out——

Mr. Bradish: We didn't put it in the package.

The Court: I'll deny Instruction 10. 11 refused. 12 is negligence; 13 is negligence, 14 is negligence, 15 is negligence——

Mr. Bradish: 15 isn't necessarily negligence. 15 I think could go to warranty or any affirmation made concerning its condition.

Mr. Lanier: It's truly a negligence instruction. It doesn't apply to warranty.

The Court: I won't give 15. [207]

What about 16, Mr. Lanier?

Mr. Bradish: I don't think even Mr. Lanier will find any fault with that.

Mr. Lanier: I have no objection to that, your Honor.

The Court: 16 I'll give. 17 is out; 18 is out; 19 is out; 20 is out.

Mr. Bradish: Now, the only other two are those that you don't have copies of but they are the two sections of the Uniform Sales Act. One defines express warranty and the other deals with the giving of notice within a reasonable time.

The Court: Didn't I understand that Mr. Lanier examined them and Mr. Rourke, and they didn't object.

Mr. Lanier: Yes, that's 21 and 22. The only thing that I do object to, your Honor, is the fact that they quote the Civil Code of the State of California. We do not have with us the same applicable code of North Dakota, and it seems like to me in order to avoid any error that in [208] quoted the law of California, the substantive law in this case to me is in itself error.

The Court: I thought both sides had assured me that the statutes are similar.

Mr. Lanier: They are and I would be taking no exceptions, your Honor, but because of this, and I don't see why we should confuse this record by stating that Section 1732——

Mr. Bradish: All right, let's just put down there——

Mr. Lanier: "The law of North Dakota applicable to this case provides as follows:" I think that that is the way that it should be.

Mr. Packard: "The law applicable in this case"—don't say North Dakota—just say "the law applicable to this case provides as follows:"

The Court: I think probably you are right about that.

Mr. Bradish: Now, after your Honor instructs the jury, then we will [209] have a session with your Honor before the jury goes out to make our formal objections or exceptions——

The Court: Out of the presence of the jury.

Mr. Bradish: Yes. Thank you.

Mr. Lanier: Let the record show that plaintiff's counsel has permission of the Court to make his

instruction request No. 17 in longhand on scratch paper——

The Court: I don't care if it's scratch paper or some other kind.

Mr. Bradish: To which we have no objection and we will waive any right we have to receive a copy of it.

The Court: "You are instructed that the defense of contributory negligence is pled by the defendants. The burden of proof to show contributory negligence is on the defendants to prove contributory negligence by a preponderance of the evidence." Instruction No. 17.

Mr. Packard: I don't have any objection. [210]

(Whereupon, a recess was taken until one-thirty o'clock p.m.)

Afternoon Session

(Whereupon, at the hour of one-thirty o'clock p.m., the hearing was resumed, pursuant to adjournment, and the following further proceedings were had in chambers:)

Mr. Bradish: For the record, on behalf of the defendant, Rexall Drug Company, in view of the dismissal of Count 1, which sounds in negligence as to defendant, Rexall Drug Company, and the further dismissal of any claim of implied warranty, on behalf of the defendant, Rexall Drug Company, I would move at this time for the court to strike the depositions of Mrs. Donald Carlson and Mrs. Carl Carlson, which were read into evidence over objection made at that time to the jury. This motion

is made on the ground that nothing contained in the depositions of Mrs. Donald Carlson or Mrs. Carl Carlson would be in any way material to establish any express warranty, made on behalf of Owl Rexall to the plaintiff in this action, or there would be nothing material in those depositions to [211] establish any breach of any express warranty made by defendant Rexall Drug Company to the issues in this case.

Mr. Packard: And may the record show that the defendant, Arnold L. Lewis, doing business as Studio Cosmetics, joins in the motion on the basis that the only issue now existing as against said defendant is on negligence, and that these depositions are certainly not admissible to show that there was any negligence on the part of the defendant in the compounding, mixing or making of said solution.

Mr. Lanier: May the record show that both motions are resisted on the grounds, first, that they are not timely. Second, upon the grounds that the two depositions both go to the question of proximate cause as to both defendants and the question of negligence as to the defendant Studio Cosmetics.

The Court: Motion denied.

Mr. Packard: I submit I do not agree they are material as to [212] negligence to show that somebody else at a later date used some product and had some trouble with it therefore the manufacturer was negligent in the mixing of the solution. It may well be that the jury will be confused as to the purpose for which this is admitted. We object to it being admitted upon any grounds and we

have heretofore noted our objections, and we are going to stand on the record insofar as the objections heretofore made, and we incorporate them at this time for further consideration of the Court.

(Whereupon, the Court, counsel for the respective parties, the reporter and the clerk proceeded to the courtroom, and the following proceedings were had in open court:)

The Court: Ladies and gentlemen of the jury, we finally got things worked out now, so the lawyers may go to you with their arguments in the case and after the arguments have been concluded the Court will have the responsibility of instructing you with reference to the law. The plaintiff may open the arguments. [213]

(Whereupon, counsel delivered their summations to the jury and, thereafter, occurred the following proceedings:)

The Court: Ladies and gentlemen of the jury, another day, according to the usual hour, has come to an end and I'll not ask you to listen to the instructions tonight, but I'll let you go until—I think I'll make it ten o'clock in the morning, but do please be here, all of you, at ten, so we can begin giving the instructions immediately and then you will go to your jury room to proceed with your part of the case. You've heard everything now that you're entitled to hear until you get the instructions of course, so keep your minds clear of any outside suggestions from any source at all until you've heard the instructions of the Court and have been segregated just among yourselves to consider the

evidence which has been produced here in this case. The bailiff may take the jury.

(Whereupon, at four-thirty p.m. April 15, 1958, the hearing was adjourned until 10 o'clock a.m. April 16, 1958.) [214]

Be It Remembered, that a further hearing was had in the above-entitled and numbered cause, on its merits, before the Honorable Fred L. Wham, Judge presiding, and a Jury, in the Federal Court Room, Federal Building in the City of Los Angeles, State of California, on April 16, 1958, beginning at the hour of 10:00 o'clock a.m.

There were present, at said time and place, the appearances as heretofore noted.

Whereupon, the following proceedings were had in open Court:

The Court: Ladies and gentlemen of the Jury. [215] Our long, perhaps at times wearying session together, has about come to an end. Very soon now the lawyers' work and my work will be over, largely, and you will carry the burden of the case. I want to thank you most sincerely for your patient attention to the evidence in the case and also your diligence in attending upon the sessions of the Court. It is not easy always, and I always do appreciate a jury which shows the tendency which you have shown to be serious about your duties and obligations. The duties of a Court and Jury respectively are quite distinct from each other. You have the duty of deciding what the facts are

in this case from the evidence, but under the instructions given to you by the Court. The Court has the duty of giving you those instructions in a way, if possible, that you can understand, and apply the instructions in considering the evidence and in determining your verdict in a just and fair manner.

It becomes my duty now as Judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and [216] weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you. [217]

The Court will endeavor to give you instructions embodying all the rules of law that may become necessary in guiding you to a just and lawful verdict. I might interpolate there, that if the instructions seem rather long—lengthy—take sometime to deliver to you, it will be for that very reason that I have endeavored to cover all the principles which are applicable here that you should be advised about. The applicability of some of these instructions will depend upon the conclusions you reach as to what the facts are. As to any such instruction, the fact that it has been given must not be taken as indicating an opinion of the Court that the instruction will be necessary or as to what the facts are. If an instruction applies only to a state

of facts which you find does not exist under the evidence, you will disregard the instruction. [218]

If in these instructions any rule, direction or idea has been stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction, and ignore the others, but you are to consider all the instructions and as a whole, and to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance. I made an endeavor as best I could, in the limited time I had, to organize the instructions so they will be somewhat in logical order, but it's not my purpose to emphasize any particular principle above others. [219]

At times throughout the trial the Court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witnesses. As to any offer of evidence that has been rejected by the Court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the

reason for the objection; nor may you draw any inference from the question itself. [220]

You must weigh and consider this case without regard to sympathy, prejudice or passion for or against any party to the action.

And I might emphasize again what the lawyers said to you so wisely yesterday, you shouldn't hold any prejudice that any lawyer may have incurred. I don't think it happened here because I thought the case was tried in a very gentlemanly way, but it is not the lawyers who are in this litigation, it's the client, and you mustn't hold anything a lawyer may have said or done or failed to say and do, that you thought he should have, against his client. [221]

It is your duty as jurors when you come to consider your verdict to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors. [222]

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but are judges. The final test of the quality of your service will lie in the verdict which you return to the court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict. To that end, the Court would remind you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth. [223]

Upon retiring to the jury room you will select one of your number to act as foreman, who will preside over your deliberations and who will sign the verdict to which you agree. As soon as twelve of you will have agreed upon a verdict, you shall have it signed and dated by your foreman and then shall return with it to this room. [224]

In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. In other words, the "burden of proof" as to that issue is on that party. This means that if no evi-

dence were given on either side of such issue, your finding as to it would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue. [225]

This is a civil action, Ladies and Gentlemen of the Jury, brought by Sandra Mae Nihill, a minor, of the State of North Dakota, by and through her father and regular guardian, John Nihill, also of the State of North Dakota. That this action, brought against two defendants, the Rexall Drug Company, a corporation, and Arnold L. Lewis, an individual, doing business as Studio Cosmetics Company.

This action is brought under two separate causes of action. Number One sounding in negligence and Number Two sounding in breach of warranty.

I pause there to emphasize again what I told you yesterday, or day before, that the way the case has developed the plaintiff is not insisting on a judgment on the first count against the Rexall Drug Company, only against Lewis, doing business under the name of Studio Cosmetics Company. And as to the Second Count, Count Two, there is no

request for you to find a judgment against Lewis, or the Studio Cosmetic Company, but only as against Rexall. That Count is based on a charge of violation of a warranty, and Lewis isn't charged with that, but only the Rexall people are charged with that. So when you consider Count One, you will consider it only [226] as to Lewis, or the Studio Cosmetics Company. When you consider Count Two—Count One being based on negligence—When you consider Count Two, which is based on a charge of warranty, then you will consider that only as to the Rexall Drug Company.

Under the negligence cause of action, the plaintiff, in her pleadings, alleges that the defendant Rexall Drug Company, was the distributor of Cara Nome products, and that the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, was the manufacturer of said product. She also alleges that on the fifth of February, 1955, plaintiff purchased—plaintiff here being of course Sandra Mae Nihill—from the Kensal Drug Company of Kensal, North Dakota, a bottle of said product of Cara Nome, which was sealed; she also alleges that this product was immediately taken to the home of the plaintiff, and opened and used pursuant to directions accompanying said product; that within ten days after said use plaintiff's hair began coming out and continued to do so until it was all gone; that ever since she has been bald [227] and will always be so disfigured; that said product and the application thereof was the direct proximate cause of the loss of her hair; that the defendant, Studio Cos-

metics Company, was guilty of negligence in permitting some ingredient to be placed in said bottle that could result in the loss of hair as aforesaid, or guilty of some negligence in the mixture of said ingredients in said bottle and was negligent in advertising and selling to the public and particularly to the plaintiff, said product with its unsafe and dangerous ingredients. Of course it isn't the charge here that the Cosmetic people actually made the sale, but the charge is that the cosmetic people were negligent in the manner in which the product was made up and bottled in the mixture contained in the package.

On Cause Number Two, plaintiff alleges that said product was advertised and sold as a safe product suited to be used for the purposes for which it was used, that it was represented by defendants to be non-injurious to the hair and safe for the purposes for which it was sold and purchased; that plaintiff relied upon said representations and upon the strength of said representations, used said product as aforesaid and suffered the [228] ill effects aforesaid; that the plaintiff gave reasonable notice to the defendants after the discovery of the ill effects aforesaid.

Plaintiff further alleges that as a result of the use and application of said product, plaintiff has been disfigured for life, made bald, and subjected to humiliation and embarrassed and caused mental anguish and will continue to suffer from baldness, humiliation, embarrassment, mental anguish and all the natural attendant incapacities socially and eco-

nomically; that she has incurred expenses of medical clinics, doctors, medicines and other treatments in the endeavor to be cured and to be restored to the status of a girl with hair.

Because of all of which plaintiff demands judgment at your hands in the sum of $250,000.

And it was explained to you yesterday by counsel, the $250,000, the law requires that some sum be put in there as a maximum beyond which the jury can not go lawfully. It does not mean that you are in any sense bound, or should be influenced by the amount which is demanded, but you should fix your verdict entirely upon the evidence and your damages, if any you should allow, [229] upon the evidence, or that has been suffered by this girl.

Now as to that complaint which I have read to you, or refused before you, the defendants each has filed its own answer denying that any negligence under Cause of Action No. 1, and denying cause of Action No. 2 and affirmatively allege that the injuries and loss, if any, sustained by the plaintiff herein, were proximately caused and contributed to by the negligence on the part of the plaintiff in that she did not exercise ordinary care on her own behalf; that whatever injury or damage, if any, was suffered by the plaintiff, the same was a direct and proximate and sole result of plaintiff's physical and bodily condition and constitutional composition on, prior and subsequent to all times mentioned in plaintiff's complaint; that the plaintiff failed to give notice to the defendant within a reasonable time of this breach.

The defendants, Rexall Drug Company and Arnold L. Lewis, doing business as Studio Cosmetics Company, pray that plaintiff take nothing by reason of her complaint. That makes up the issues that you are to try, the complaint and the answers to the complaint. One side asserting, the other side denying, and insofar as defendants [230] do charge that any ill results that may have been caused by the solution, if any, they charge that it was due to the contributory negligence of the plaintiff herself. Now as to that charge of contributory negligence, the burden of proof is upon the defendants because you see they affirmatively assert that as a defense, so the burden there is upon them to prove that particular defense by a preponderance of the evidence.

You are instructed further that the rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience, has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the issue. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound. [232]

In this case there has been a conflict in the testimony of expert witnesses concerning the cause of

the loss of hair by the plaintiff and whether or not that loss of hair is permanent. You must resolve that conflict. To that end, you must weigh one expert's opinion against that of another, and the reasons given by one against those of another, and the relative credibility and knowledge of the experts who have testified. Thereupon, you shall find in favor of that expert testimony which, in your opinion, is entitled to the greater weight. [233]

In examining an expert witness, such as a physician and surgeon, counsel may propound to him a type of question known as a hypothetical question. By such a question, the witness is asked to assume to be true a hypothetical state of facts, and to give an opinion based on that assumption.

In permitting such a question, the Court does not rule, and does not necessarily find even in its own mind, that all the assumed facts have been proved. It only determines that those assumed facts are within the probable or possible range of the evidence. It is for you, the Jury, to find from all the evidence whether or not the facts assumed in a hypothetical question have been proved, and if you should find that any assumption in such a question has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumption.

Failure to prove a fact assumed in a hypothetical question may make the opinion based on it entirely worthless, or the opinion may, nevertheless, have weight and value, depending on the relationship of such an assumed fact to the issues of the case, the

facts proved [234] and the expert opinion. In respect to such a matter, you will apply your own reasoning to the end of drawing a conclusion that will be just and sound. [235]

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or a stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you never had known of it.

You must never assume or speculate to be true any insinuation carried or suggested by a question put to a witness by examining counsel or by the court. The examiner's question is not evidence except only as it explains or throws light upon the answer.

You are to decide this case solely upon the evidence that has been received by the court, and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in my instructions, and in accordance with the law as I state it to you. [236]

You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely

from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption. The Court will inform you of any presumption that may become applicable in this case. [237]

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a finding in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that a balance of probability exists pointing to the accuracy and honesty of the one witness. [238]

In judging the credibility of witnesses, you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence, by the manner in which the witness testifies, by the character of his testimony, or by evidence that shows or pertains to the character of the witness for truth or integrity, or that pertains to his motives, or by

proof that he has been convicted of a felony. There was no such proof as that in this case, and therefore that matter of conviction need not be considered here. [239]

A witness false in one part of his or her testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless from all the evidence you shall believe that the probability of truth favors her testimony in other particulars. [240]

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which lies within the power of one side to produce and of another to contradict.

If and when you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust any weaker and less satisfactory evidence actually offered by her or him on that point. [241]

In the present action certain testimony has been read to you by way of deposition.

You are instructed that you are not to discount this testimony for the sole reason that it has come to you in the form of a deposition. It is entitled to the same consideration, the same rebuttable presumption that the witness speaks the truth, and the same judgment on your part with reference to its weight, as is the testimony of witnesses who have confronted you from the witness stand. [242]

Now I have explained to you about the position

of the parties with reference to the complaint at this time. I now give you some further instructions along that particular line.

You are further instructed that under the proof in this case the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, cannot be held liable for breach of warranty and you cannot hold him liable under Count Number Two of this action.

To hold the defendant, Studio Cosmetics Company, liable on Count One — that's the count that charges negligence—you must first find that defendant guilty of negligence as negligence is hereinafter defined and that the plaintiff, Sandra Mae Nihill, is free of any contributory negligence. If you so find from the evidence, then you should bring in a verdict under Count One, for the plaintiff and against the defendant, Studio Cosmetics Company.

Added to that instruction, I think should be the further instruction that even though negligence be proved, unless you find it to be the proximate cause of the damage to Sandra Mae Nihill, then the fact that there was negligence can not be of any moment in this case, but [243] you must find first there was negligence, and, secondly, that negligence proximately caused the injury which the plaintiff complained of here. Then you must further find that she, herself, was free of contributory negligence.

It is your duty to consider and make up your verdict from all the evidence in the case, taking into consideration the rule of evidence that I will now give you. That rule of evidence is known as res

ipsa loquitur, that is to say, the thing speaks for itself, and that rule of law is recognized by the Courts as the law in cases similar to this.

That if you should believe, from the evidence in this case, that Sandra Nihill suffered an injury as a proximate result of the application of the Cara Nome Pin Curl Wave, and, if you should believe, from the evidence, that in the application of this product she used all of the instructions put out by the defendant manufacturer, Studio Cosmetics Company, and properly and clearly followed same, as put out, and that no tampering had been done with it, and that nothing else caused her injuries, or her condition, then, under the law, you are authorized to draw the inference of negligence, and by that is meant this: [244]

That the rule of evidence applies where the plaintiff cannot have or be expected to have any information as to the manufacture or the ingredients or the effect of the home wave product used, or have any information as to what might result from the use thereof, whereas the manufacturer, Studio Cosmetics Company, must be assumed to have full information of all of these subjects and know just what material and what workmanship were used, and what the effects upon a human being might be from the use of these materials and failed to make known these things to the plaintiff and to the public. That is so particularly where the event following the use of the product is shown to be that ordinarily not expected to occur when the manufacturer uses due

care in the manufacture of such a product, and it is not necessary for the plaintiff to go further and prove particular acts of omission or commission on the part of the manufacturer from which the event resulted, but the event itself makes proof of inference of negligence on the part of the manufacturer from which the jury may infer that the manufacturer was negligent, if the plaintiff has shown by a preponderance of the evidence that the product was manufactured by the defendant and that all instructions put out by the defendant for its application [245] were followed substantially by the one using it, and that the one using such product was injured as a result of using it, then that inference of negligence arises, but it is not conclusive; it is an inference of negligence that the plaintiff is entitled to have received without further proof. [246]

You are instructed that the defense of contributory negligence is pled by the defendants. The burden of proof to show contributory negligence on the part of the plaintiff, is on the defendant to prove such contributory negligence by a preponderance of the evidence before the jury can find contributory negligence. [247]

You are instructed that the manufacturer of a product that is either inherently dangerous, or reasonably certain to be dangerous if negligently made, owes a duty to the public generally and to each member thereof who will become a purchaser or user of the product. That duty is to exercise ordinary care to the end that the product may be safely used for the purpose for which it was intended and for

any purpose for which its use is expressly invited by the manufacturer. Failure to fulfill that duty is negligence. [248]

You are instructed that this action is brought under two specific counts, one for negligence and the other for breach of warranty.

You are further instructed that the defendant, Rexall Drug Company, has no duty to inspect and cannot be held liable in this case because of mere negligence and hence under Count One of the complaint, you cannot hold the defendant, Rexall Drug Company, liable.

To hold the defendant, Rexall Drug Company, liable under Count Two, you must find that the defendant, Rexall Drug Company, in its advertising, or in the guaranties in said advertising, if any, or in any written guarantees delivered to the purchasers with the product, if you find such guarantees were delivered with the product, has made representation as to quality and merits of its products aimed directly at the ultimate consumer and urges the consumer to purchase the product from a retailer, and such consumer does so purchase in reliance on and pursuant to the inducements of the defendant, Rexall Drug Company, and thereby suffers damages as a proximate result of the use of said product.

If you so find, and if you further find that the plaintiff was free of negligence in the application of this product, then you shall find for the plaintiff as against the defendant, Rexall Drug Company. [249]

You are instructed that evidence may be either direct or indirect. Direct evidence is that which

proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes the fact. Indirect evidence, known as circumstantial evidence, is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence, or circumstantial evidence, is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be found on a fact or facts proved, and be such a deduction from those facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature. [250]

Another name for indirect evidence is circumstantial evidence. Both direct evidence and circumstantial are recognized and admitted in courts of justice, and upon either or both juries lawfully may base their findings.

The law makes no distinction between the two classes as to the degree of proof required, but respects each for such convincing force as it may

carry and accepts each as a reasonable method of proof.

Negligence and proximate cause may be proved by indirect evidence, if it carries the convincing force needed to constitute a preponderance of the evidence. [251]

You are instructed that the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, is not the insurer or guarantor of plaintiff's safety. The duty and care imposed upon the defendant is not absolute, such as the liability of an insurer would be, but it is only his duty to use ordinary care under the circumstances. [252]

If the evidence in this case indicates that the condition of the plaintiff, Sandra Mae Nihill, may have been the result of some act or omission on her part, or may have been the result of natural causes beyond the control of the defendant, it will be your duty to find that the condition was not caused by reason of any act or omission on the part of the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company.

I assume the same instruction would apply to Rexall Drug Company, Mr. Bradish, and the jury are so instructed. [253]

In deliberating upon this case, you must bear in mind that not every accident gives rise to a cause of action upon which the party injured may recover damages from some one. Accidents occur every day, for which no one is to blame, not even the one who is injured. [254]

If you believe from all the evidence that the dam-

age to the plaintiff, Sandra Mae Nihill, was due to some prior condition not discoverable by the defendant in the exercise of ordinary care, then I instruct you that the plaintiff herein cannot recover for any damage which she may have received as the result of the application of the solution in question.

You are instructed that in the event you can not determine from the evidence whether the plaintiff, Sandra Mae Nihill's injuries are the result of any one of a number of different possibilities, then I instruct you that you must find for the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, and against plaintiff.

Then under that same state of findings you would also have to find in favor of the Rexall Drug Company. [256]

Where a product is delivered or sold to a person for use and instructions for the use of the product go with it, it is incumbent upon the plaintiff to prove by a preponderance of the evidence that such instructions were followed. The burden is upon the plaintiff. The evidence of compliance with the directions must be shown to you by competent testimony. If in the instant case the plaintiff, Sandra Mae Nihill, has failed to show by any evidence which preponderates that she followed the directions given for the use of the cold wave solution, then you must find in favor of all of the defendants in this case and against the plaintiffs. [257]

The mere fact that I have in the course of these instructions given you particular instructions concerning a negligence and breach of warranty, is not

to be construed by you as in any way an intimation by this Court that it feels that there has or has not been any proof upon that particular subject, nor are you to construe it as an expression of opinion of this Court upon the subject. The court is required by law to give you instructions upon each theory advanced by the parties. [258]

If you should believe from the evidence that instructions with reference to the use of the cold wave solution in question were furnished the plaintiff, Sandra Mae Nihill, and should further believe that the plaintiff, Sandra Mae Nihill, in the exercise of ordinary care should have followed said instructions and failed to do so, she was guilty of contributory negligence. If you should believe that the plaintiff, Sandra Mae Nihill, was negligent in this regard and that such negligence contributed to the injury and damage, if any, by the plaintiff sustained, your verdict must be in favor of the defendant. [259]

It is immaterial if any warranties were made whether they were true or false if, in fact, the breach of such warranties was not the cause of plaintiff's damages, if any. In order for the plaintiff to recover upon a breach of warranty she must establish by a preponderance of the evidence that the particular warranty which she claims was false and which was breached was the actual cause of the damage. [260]

Although there are two defendants in this action, it does not follow from that fact alone that if one is liable, both are liable. Each is entitled to a fair consideration of his own defense and is not to be preju-

diced by the fact, if it should become a fact, that you find against the other. The instructions given govern the case as to each defendant, insofar as they are applicable to him, to the same effect as if he were the only defendant in the action, and regardless of whether reference is made to defendant or defendants in the singular or plural form. [261]

Negligence is the doing of an act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person. That means negligence is the failure to use ordinary care in the management of one's property or person. This definition of negligence applies irrespective of whose conduct is in question, whether that of the defendants, or of the plaintiff, or of any other person. [262]

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct. [263]

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves and to others. [264]

Contributory negligence is negligence on the part of the person injured, which, cooperating with the

negligence of another, helps in proximately causing the injury of which the former thereafter complains.

You will note that in order to amount to contributory negligence, a person's conduct must be not only negligent, but also one of the proximate causes of her injury.

One who is guilty of contributory negligence may not recover from another for the injury suffered.

The reason for this rule of law is not that the fault of one justifies the fault of another, but simply that there can be no apportionment of blame and damages among the participating agents of causation. [265]

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies. [266]

The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent.

The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then she has failed to fulfill her burden of proof.

To put the matter in another way, if after considering all the evidence, you should find that it is just as probable that either the defendant was not negligent or that his negligence was not a proximate cause of the accident, as it is that some negligence on his part was such a cause, then a case against the defendant has not been established. [268]

In determining whether negligence or proximate cause, or contributory negligence, or any claim or allegation in this case has been proved by a preponderance of the evidence, you should consider all the evidence bearing either way upon the question, regardless of who produced it. A party is entitled to the same benefit from evidence that favors his cause or defense when produced by his adversary as when produced by himself. [269]

The burden rests upon the plaintiff to prove by a preponderance of the evidence the elements of her damage, if any. The mere fact that an accident happened, considered alone, would not support a verdict for any particular sum. [270]

You are not permitted to award plaintiff speculative damages, by which term is meant compensation for future detriment which, although possible, is remote, conjectural, or speculative.

However, should you determine that the plaintiff is entitled to recover, you should compensate her for future detriment if a preponderance of the evidence shows such a degree of probability of that detriment occurring as amounts to a reasonable certainty that it will result from the original injury in question.

You have been and will be instructed in more de-

tail on the subject of the measure of damages in this action because it is my duty to instruct you as to all the law that may become pertinent to your deliberations. The fact that such instructions have been given you must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict. [272]

When a distributor—and here you recall that the Rexall Drug Company stood in the position of distributor—when a distributor purchases a commodity such as cold wave solution from a manufacturer for resale, he is under no duty to make tests for the purpose of discovering whether or not it has dangerous characteristics. [273]

You are instructed that the defendant Rexall Drug Company was not an insurer of the safety of the plaintiff.

No matter how negligent the defendant may or may not have been, yet if any negligence on the part of the plaintiff, Sandra Mae Nihill, however slight, proximately contributed to the occurrence of the accident, then you are instructed that the plaintiff cannot recover in this action on the issue of negligence.

Neither suspicion, nor speculation, nor surmise is evidence and a verdict cannot be sustained where it depends on suspicion, or surmise, or speculation, or guess work. [274]

The plaintiff, if entitled to recover damages herein, as to any defendant, will not only be entitled

to recover as against any particular defendant such damages, if any, as have been shown by a preponderance of the evidence to have been proximately caused by the acts or omissions alleged in the particular cause of action upon which the plaintiff is proceeding against such defendant. [275]

The plaintiff claims to have been damaged by reason of breach of certain express warranties made by the defendant, Rexall Drug Company. The burden is on the plaintiff in order for her to recover for the breach of any such warranty to prove by a preponderance of the evidence each of the following facts:

1. That such warranty was, in fact, made by the defendant sought to be charged. That such express warranty was actually communicated to plaintiff.
2. That she relied thereon.
3. That she was justified in such reliance.
4. That the warranty was breached.
5. That she sustained damages.
6. That those damages were the direct and actual consequence of such breach. [276]

You are instructed that the law applicable to this case provides as follows:

In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after

the buyer knows, or ought to know of such breach, the seller shall not be liable therefor." [277]

The law further provided:

That any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty. [278]

You are instructed that in considering damages, whether they could have been anticipated or not, you may take into consideration pain and suffering, embarrassment and humiliation causing mental anguish, all those expenses which have been incurred as a result of the injury and all those expenses which reasonably may be incurred in the future, and any probable embarrassment, mental anguish and loss of income in the future. [279]

Here is an instruction that will be interesting to the jury as a side help, as it were, if you should determine the plaintiff should have damages, then you have a right to take into consideration her age and the probable length of her life.

You are instructed that according to the American Experience Table of Mortality, the expectancy of life of one aged sixteen years is forty-five years.

This fact, of which the Court take judicial notice, is now in evidence to be considered by you in arriving at the amount of damages, if any, if you find that plaintiff is entitled to a verdict.

However, the restricted significance of this evidence should be noted. Life expectancy shown by the mortality tables is merely an estimate of the probable average remaining length of life of all persons in our country of a given age, and that estimate is based on not a complete but only a limited record of experience. Therefore, the inference that may be drawn from the tables applies only to one who has the average health and exposure to danger of people of that age. Thus, in connection with this evidence, you should consider all other evidence bearing on the same issue, such as that pertaining to the occupation, health, habits and activity of the person whose life expectancy is in question. [280]

If, adhering to the court's instructions, you should find that the plaintiff is entitled to a verdict against either, or both defendants, it then will be your duty to award the plaintiff such amount of damages as will compensate her reasonably for all detriments suffered by her by the negligence of the defendant, Studio Cosmetics Company, or the breach of warranty of the Rexall Drug Company, if any against either defendant, or both, as found by you was a proximate cause, whether such detriment could have been anticipated or not. [281]

Now, when you go to your jury room, the first thing you will do, of course, is to select your foreman, as I have told you heretofore, and proceed to consider your verdict.

The verdict in this case is susceptible of being returned in different forms and, for your con-

venience and not for your instruction, I'll have the clerk prepare forms of verdict which you may examine and adapt to your use as will be required. I'll read them to you so that you may catch the drift of them and understand them when you have reached a verdict, which one to use, and the order of their reading of course intimates nothing as to what verdict should be returned. First, I find on top:

"We, the jury, duly empaneled to try the above-entitled cause, find for the plaintiff, Sandra Mae Nihill, a minor, by her father and regular guardian, John Nihill, and against the defendants, Rexall Drug Company, and assess her damages in the sum of $....., and find in favor of the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company and against the plaintiff, Sandra Mae Nihill."

That, of course, would be the verdict used if you find against Rexall and in favor of the Studio Cosmetics Company. [282]

If you come to the conclusion that neither of the defendants is liable, the form of your verdict would be:

"We, the Jury, duly impaneled to try the above-entitled cause find for the defendant, Rexall Drug Company, a corporation, doing business as Cara Nome Rexall, and Arnold L. Lewis, doing business as Studio Cosmetics Company, and against the plaintiff, Sandra Mae Nihill, a minor, by her father and regular guardian, John Nihill." [283]

If you should find that both defendants are liable, then the form of your verdict would be:

"We, the Jury, duly impaneled to try the above entitled cause, find for the plaintiff, Sandra Mae Nihill, a minor, by her father and regular guardian, John Nihill, against the defendant, Arnold L. Lewis, doing business as Studio Cosmetics, and assess her damages in the sum of $....., and find in favor of the defendant, Rexall Drug Company, a corporation, doing business as Cara Nome Rexall, and against the plaintiff Sandra Mae Nihill." [284]

If you should find against both defendants, then the form of your verdict would so state and say you find in favor of Sandra Mae Nihill and against each of the defendants and assess her damages in the sum of $..... against both of them.

Now, of course the plaintiff is only entitled to one recovery in this suit. She suffered only one injury and if you find against both of them, don't double up because you are finding against both of them, because you find what the injury to her, her damages, are, under these instructions, under the evidence.

If you find against one of them only, then it will normally, naturally, be the same amount, so far as the legal rights are concerned as if you find against both of them. There's one injury, one set of damages, if any, and not more than one set of damages because there are more than one defendant.

If counsel will go with me to Chambers, I will give you a chance to——

(Whereupon, the Court, counsel, and reporter, retired to Chambers, where the following occured out of the hearing of the Jury:)

In Chambers

The Court: Now the plaintiff first.

Mr. Lanier: All right, your Honor. May the record show that the plaintiff excepts to the giving of defendant Studio Cosmetics, instruction requests by attorney Packard, Nos. 1, 9, 21, 47 and 49. May the record further show exception to the instruction request as given for the defendant, Rexall Drug Company, through its attorney Mr. Bradish, No. 2. That's all, your Honor.

The Court: Have you any request for further instruction?

Mr. Lanier: No request, your Honor.

The Court: All right, Mr. Packard.

Mr. Packard: Let the record show the defendant Studio Cosmetics, Arnold L. Lewis, doing business as Studio Cosmetics, objects to the giving of Plaintiff's Amended Instruction Request No. 6, which is an instruction [286] based upon the doctrine of res ipsa loquitar. I have thoroughly gone into the matter, I believe, in my motion for nonsuit and directed verdict. I feel that the instruction is not applicable in a situation where there is testimony of several plausible causes, one of which the defendant would not be responsible or liable. Secondly, I object to the giving of the instruction. The

instruction itself is ambiguous, uncertain, it doesn't properly instruct the jury on the doctrine of res ipsa loquitur, and it does not submit to the jury the doctrine of res ipsa loquitur as a question of fact, but submits the matter to the jury upon a finding by the court as a matter of law that the doctrine is applicable. I object to the giving of the instruction and I state that it is error to give the instruction and further that it was improperly submitted——

The Court: It was the intention of the court to submit certain of the questions upon which the doctrine was based to the findings of the jury. [287]

Mr. Packard: Well, I feel that it does not submit the question of control or the elements of the doctrine of res ipsa loquitur as a question of fact, or whether it was a type of result which would normally follow in the course of human events, it's not for the negligence of the defendant, and the other requisites for the doctrine have not been given in the instruction; that it's uncertain in that they refer to "if you find from the evidence that Sandra Nihill suffered an injury as a proximate result", there's an inference of negligence, and it's uncertain as to what you refer to by an "injury" in the case. Further, the instruction contains the language "that is so, particularly where the event following the use of the product is shown to be that ordinarily not expected", and it's uncertain as to what is referred to as "event following", and I believe it fails to instruct what proximate cause is. I want the record to show that we object to the

instruction—plaintiff's amended instruction No. 6—on those grounds, not limiting our objection to those [288] grounds, but claim the doctrine is not applicable.

The Court: I take it, Mr. Bradish, on behalf of the Rexall people, you wish to join in these objections and exceptions.

Mr. Bradish: I do in this one regard, your Honor, because I feel that the instruction as given does not properly set forth the necessary affirmance that must be found by the jury before the doctrine of res ipsa loquitur is applicable. And, secondly, the wording of the instruction makes it confusing, and does not properly identify the application of it, if any, to the one defendant, Studio Cosmetics Company. I think that the jury could possibly be confused by the wording of the instruction.

The Court: As to that latter objection, of course, if it's subject to that objection, why that would be properly be brought by you and you would be entitled to the exception.

Mr. Packard: Well I just want to show that I except to the giving of that instruction—Amended Instruction [289] Request No. 6.

The Court: Ordinarily, I wouldn't think he was entitled to any exception on that instruction because it only applies to Count One, but on his particular statement that he thinks it may have been misconstrued by the jury, he is entitled to his objection.

Mr. Packard: Then I wish to except to plaintiff's jury instruction No. 7, which states that the manufacturer of a product that is inherently dan-

gerous, or reasonably certain to be dangerous if negligently made, owes a duty to warn, and so forth, upon the basis that there's no evidence in this record to show that the product in question was inherently dangerous. The only evidence shows that it is an alkali, that the contents are not as strong as those contained in a lot of normal home soaps and there's no evidence whatever to show that the solution made in any particular concentration would be toxic or have ill effects. I object and except to that.

The Court: Let the objection be noted and exception entered. [290]

Mr. Packard: I would like the record to show that we have requested No. 7——

The Court: Are you sure it wasn't withdrawn?

Mr. Packard: As a matter of fact, I will waive any further requests for additional instructions, but I just object to and except to instructions given by the plaintiff——

The Court: Well most of them that I didn't give were either conflicting with the cases in existence or were withdrawn in recognition of that fact.

Mr. Packard: Your Honor is right in that regard.

The Court: Now, then, Mr. Bradish.

Mr. Bradish: Yes, your Honor. Your Honor read——

The Court: I might state to you all that when it comes to making up your record or transcript, down at the left-hand corner, in pencil I have noted the number in the [291] order given to the jury, which

might be useful to you in some way. All right, proceed.

Mr. Bradish: Insofar as my exceptions are concerned, I likewise would except to Plaintiff's Instruction No. 7 on the ground that it is confusing in its language and doesn't distinctly restrict its application to the defendant Studio Cosmetics Company, and in more particularity I except to the wording "for which its use is expressly invited by the manufacturer," as being susceptible of confusion in connection with the claim of express warranty and breach thereof by defendant Rexall Drug. Now, your Honor read and gave my defendant's requested instruction No. 16, but your Honor, in so reading it, it reads:

"The plaintiff, if entitled to recover damages herein, as to any defendant, will only be entitled to recover as against any particular defendant such damages, if any, as have been shown by a preponderance of the evidence to have been proximately caused by the acts or omissions alleged in the particular cause of action upon which the plaintiff is proceeding against such defendant." [292]

Your Honor, I am sure, by accident, when you read it, you inserted the word "not" between the word "will" and "only" on line 2, and as I heard the instruction read, it read:

"Plaintiff, if entitled to recover damages herein, as to any defendant, will not only be entitled to recover as against any particular defendant, etc." and with the word "not" in there, the instruction wasn't clear in my opinion.

The Court: Now, what instruction is that?

Mr. Bradish: In my No. 16, your Honor. It probably doesn't mean anything, but I just thought that as long as we were raising our exceptions, I would note that. I think that probably if it was confusing it probably was cleared up.

The Court: I have no indication here that I had in mind to change it in any way.

Mr. Bradish: I know that. I think that you just, as we all do sometimes, you slipped the word "not" in, and perhaps I heard it and it wasn't said, I don't know. Maybe [293] I heard wrong, we would have to check with the reporter. I'm not making any big issue of it, your Honor.

The Court: I don't much believe I made that error. You may have misheard me, but on the other hand I am far from being——

Mr. Bradish: Now, I except, thirdly, to plaintiff's amended instruction No. 8, insofar as it was read from line 12 through and including line 25, on the ground that it includes the words "guarantees delivered to the purchasers with the product," and that's based upon the ground that certain documents contained in the sealed package of wave set were never identified as having been connected with the Rexall Drug Company, and could not be construed to be an express warranty within the meaning of the allegations.

The Court: I have a feeling that the evidence was such that that would have to go to the jury as a question of fact. [294]

Mr. Bradish: All right. Now, just one last thing,

your Honor. After your Honor read the verdict forms to the jury, your Honor made the statement, which I don't think you meant to do, "that the plaintiff was only entitled to one recovery," and I think——

The Court: Well, isn't that true?

Mr. Bradish: Well the plaintiff isn't necessarily entitled to any recovery.

Mr. Lanier: He used the words "if any" though, counsel.

Mr. Packard: He didn't at that time. I have a note. He said, "Now I want to caution you that the plaintiff is only entitled to one recovery here and that you are not to take and apportion between the defendants, but you should return just one sum," and then at the end you said that "if you find she is entitled to a verdict."

The Court: I thought I covered that. [295]

Mr. Lanier: I think you're correct in your memory on that too, counsel, when he first stated it he did not include the words "if any," but when he restated it he did include the words "if any."

The Court: I thought there was a danger inherent there, that the jury would say well we will double up here on this and make a double shot because they are both guilty and they both ought to pay, but that was the thing I had in mind, and I probably shouldn't have touched it at all, but I think I made it clear to them. I believe they understood me.

(Whereupon, the Court, Counsel for the respective parties and the reporter returned to

the court-room and the following occurred in open Court:)

The Court: Now, when you go to the jury room you will be permitted to take the exhibits with you and the forms of verdict, and then you will elect your foreman and if and when you arrive at a verdict, you will note there the place to put the date, also a place for [296] the foreman to sign his name. Be sure and date your verdict and have the foreman sign it for all of you. There's nothing further, gentlemen. The bailiff may take the jury. Let the bailiff be sworn.

(Whereupon, the Clerk administered the oath to the bailiff and matron.)

The Court: You may pass.

(Whereupon, the jury retired to consider their verdict.)

The Court: An order may be entered that when the noon hour is reached, if the jury has not reached a verdict by that time, that they be kept together during the noon hour and given government pay for their lunch. I suppose you have to make some arrangement about that.

The Court will stand in recess.

(Whereupon, Court adjourned.)

Thereafter, at 2:35 o'clock p.m., Court re-convened, upon request of the jury for clarification of the definition of "negligence" as it applies to the law in this case, and the following proceedings were had in open court: [297]

The Court: Who is the foreman of the Jury?

Mr. Thomas: I am.

The Court: Did you send a request to see the Court?

Mr. Thomas: Yes.

The Court: State what your problem is.

Mr. Thomas: Several of the jurors would like to have the law explained to them as to the definition of "negligence," as it applies to the law in this case. Juror No. 1 first brought it up.

The Court: All I know to do is read the instructions that cover the problem of negligence.

Mr. Thomas: That's what we want.

The Court: Well, first, the instructions define negligence as follows: [298]

Negligence is the doing of an act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person. This definition of negligence applies irrespective of whose conduct is in question, whether that of the defendants, or of the plaintiff or of any other person. The definition includes, I would think, for the benefit of the jury, some other instructions, which read as follows:

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct.

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others. [299]

Then I instructed you with reference to contributory negligence, which would be negligence, if any, on the part of the person making the claim, and that instruction read as follows:

Contributory negligence is negligence on the part of the person injured, which, cooperating with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.

You will note that in order to amount to contributory negligence, a person's conduct must be not only negligent, but also one of the proximate causes of her injury.

One who is guilty of contributory negligence may not recover from another for the injury suffered. The reason for this rule of law is not that the fault of one justifies the fault of another, but simply that there can be no apportionment of blame and damages among the participating agents of causation.

I've used the term "proximate cause."

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies.

Then I have the further instruction modifying the whole picture. That is to the effect that an accident, in and of itself, is not any evidence of negligence.

The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent. [301] Now in this case is involved the rule of res ipsa loquitur, which was covered by an instruction which I will read to you.

To hold the defendant, Studio Cosmetics Company, liable on Count 1, you must first find defendant guilty of negligence as negligence is hereinafter defined and that the plaintiff, Sandra Mae Nihill, is free of any contributory negligence. If you so find from the evidence, then you should bring in a verdict under Count One, for the plaintiff and against the defendant, Studio Cosmetics Company. That is if you find the defendant, Studio Cosmetics Company, guilty of negligence which was the proximate cause of the injury, and the plaintiff Sandra Mae Nihill was free of contributory negligence, then she is entitled to a verdict.

Then I went on to say, It is your duty to consider and make up your verdict from all the evidence in the case, taking into consideration the rule of evidence that I will now give you. That rule of evidence is known as res ipsa loquitur, that is to say, the thing speaks for itself, and that rule of law is recognized by the Courts as the law in [302] cases similar to this.

That if you should believe, from the evidence in this case, that Sandra Nihill suffered an injury as a

proximate result of the application of the Cara Nome pin curl wave and, if you should believe, from the evidence, that in the application of this product she used all of the instructions put out by the defendant manufacturer, Studio Cosmetics Company, and properly and clearly followed same as put out, and that no tampering had been done with it, and that nothing else caused her injuries, or her condition, then, under the law, you are authorized to draw the inference of negligence, and by that is meant this:

That the rule of evidence applies where the plaintiff cannot have or be expected to have any information as to the manufacture or the ingredients or the effect of the home wave product used, or have any information as to what might result from the use thereof, whereas the manufacturer, Studio Cosmetics Company, must be assumed to have full information of all of these subjects and know just what material and what workmanship were used, and what the effects upon a human being might be from the use of these [303] materials and failed to make known these things to the plaintiff and to the public. That is so particularly where the event following the use of the product is shown to be that ordinarily not expected to occur when the manufacturer uses due care in the manufacture of such a product, and it is not necessary for the plaintiff to go further and prove particular acts of omission or commission on the part of the manufacturer from which the event resulted, but the event itself makes proof of inference of negligence on the part of the manufacturer

from which the jury may infer that the manufacturer was negligent, if the plaintiff has shown by a preponderance of the evidence that the product was manufactured by the defendant and that all instructions put out by the defendant for its application were followed substantially by the one using it, and that the one using this product was injured as a proximate result, then that inference of negligence arises, but it is not conclusive; it is an inference of negligence that the plaintiff is entitled to have received without further proof. [304]

Now as far as I know that covers the instructions that the court gave to you in reading these very long series of instructions. I'm not surprised that you forget, perhaps, concerning some of them. If that meets the problem.——

Mr. Thomas: Juror No. 8 has a question, your Honor.

The Court: I hate to start the idea of talking to all the different jurors. Do you know what the question is?

(Juror No. 8 confers with the foreman, Mr. Thomas.)

The Court: I might say this to you. I can hear you talk about the testimony, but this court can't comment on the testimony in any way at all or the weight to be given to any testimony.

Mr. Thomas: The juror is under the impression that Mr. Lewis didn't have any formula for this pin curl and I guess he wants it read out of the record just what the testimony was on that. Is that right?

The Court: Well it can be stipulated, can it not,

that there was [305] proof of a formula used by Mr. Lewis?

Mr. Bradish: I'm willing to stipulate.

Mr. Packard: I'm willing to stipulate.

Mr. Bradish: Formula pursuant to patent and license.

The Court: Wasn't that the proof, Mr. Lanier?

Mr. Lanier: I don't know if this is the proper time and place to do that, your Honor. I am trying now to recall the testimony. My recollection is that there was no formula; that he was asked to produce——

Mr. Packard: Just a moment. I'm going to interrupt. I think I stated—and I wanted to read certain testimony to this jury and this jury is entitled to have this entire record——

The Court: I heard you make that statement to the jury, Mr. Packard, and I wasn't very happy about it at the time, but there was no objection made and I didn't raise any objection myself, but the trouble with [306] that is when you read the record back to the jury, there then probably should be some opportunity for counsel to comment on that and have some other part of the record read and what not.

Mr. Packard: I think if the jury — and I am going to insist that if the jury requests any portion of this record read back to them that it be read back.

The Court: You haven't any right to insist that this jury do anything, Mr. Packard.

Mr. Packard: Well, I'm going to insist the Court

permit the reporter to read any testimony to the jury that the jury deems necessary for their determination of any issues in this case. They are entitled to have any testimony of any witnesses read back to them if they need that in their deliberations. I think that fact should be known to them.

The Court: What's your position on that Mr. Lanier?

Mr. Lanier: If the Court please, my position is only this, that is a matter which of course has always been discretionary [307] with the court and in all federal courts it is not permitted—once any one piece of testimony is singled out for unusual consideration after the testimony is given, after the case is in, it just means opening a series for constantly reading back other testimony to explain——

The Court: I'm inclined to agree with Mr. Lanier. Not that I wouldn't want to help the jury in every way I could, but I think—it has never been the practice in my court—it has never been the practice in my area—what's been the practice here, of course, I being a stranger, I don't know, but I'm going to deny Mr. Packard's request.

Mr. Packard: I would like to have the record show I make exception to the court's ruling that the jury is not permitted to have testimony read back.

The Court: You may have the exception. Let me suggest this to the jury, that you go back to your jury room and you put your assembled minds together and see if you can't arrive at what the evidence was on the particular point that you have in mind that [308] you are uncertain about, and if you

finally get to a point where you are at an impasse where you can't make any progress and you have some question you feel like the court could help you with, I think it has been the practice in this court, and I think it's a good practice, that the foreman reduce the question to writing and bring it into court in writing so the court and counsel can have a chance to see the question. Now you may return to your jury room.

Mr. Thomas: There's one other question. In order to reach a verdict, do we have to be unanimous?

The Court: Yes.

(Whereupon, the jury again retired to continue their deliberations.)

Mr. Bradish: For the record, on behalf of the defendant, Rexall Drug Company, and all due respects to your Honor's ruling and discretion, I would like to join in Mr. Packard's exception to your Honor's ruling that no testimony from the record, if [309] requested by the jury, could be read to the jury, and I did not raise the objection or the exception at the time because I felt that there had been enough discussion in the presence of the jury.

The Court: I appreciate that, Mr. Bradish; I think you are entitled to your exception.

Mr. Packard: I believe the record shows that I did except and I think the record further shows, in my closing argument, I stated to the jury that they had an opportunity to come back and have any portion of the record read to them, and there was no objection made at the time I made my argument, and now when the jury has been present here to

have certain instructions re-read and indicated they wanted certain testimony re-read, they have been denied the right of having that testimony re-read. I submit the Court is in prejudicial error.

The Court: In my judgment, counsel was out of order when he made that statement to the jury without first [310] consulting the court about it.

Mr. Packard: I think the record shows that I had ordered a transcript in this case of the testimony of one of the doctors and the reporter told me she would check with you as to whether I could get that transcript and so forth, and I thought everybody knew that I intended to read the transcript——

The Court: That doesn't follow at all Mr. Packard. It's a regular custom, particularly in larger cities in the middle West, and Chicago, that they get daily copies of all the evidence, so they will know what to ask the next witness.

Mr. Packard: I think the record shows how I feel about the matter.

Mr. Bradish: Your Honor, off the record.

(Discussion off the record.)

Mr. Packard: Let the record show that I also except to the re-reading of plaintiff's Instruction No. 6 on res ipsa loquitur, on the grounds stated after the [311] original charge to the jury, and I want the record to show my exception.

The Court: I certainly think you are entitled to your exception.

(Whereupon, the Court again recessed, and at 5:10 o'clock p.m. called the jury to the court-

room and the following proceedings were had in open court:)

The Court: I don't suppose you have ever had the experience of sitting in chambers and waiting for a jury. I begin to get curious as to how the jury is getting along. Mr. Foreman, are you making progress?

Mr. Thomas: Yes, your Honor. I think within another hour, probably an hour and a half, we can come to a verdict.

The Court: I just wanted to know if you are making progress. [312]

Mr. Thomas: Oh, yes, we are making considerable progress.

The Court: If you are, I will permit you to go back to the jury room and continue to work. The bailiff may take the jury.

(Thereupon, the jury again retired to consider their verdict.)

The Court: The court will recess.

(Whereupon, Court recessed and, at 6:40 p.m., Court reconvened and the following proceedings were had in open court:)

The Court: Mr. Foreman, have you a report to make?

Mr. Thomas: Yes, your Honor, we have arrived at a verdict.

The Court: Will you pass your verdict to the Clerk? The Clerk will read the verdict.

The Clerk: "We, the jury, duly impaneled to try the above-entitled cause, find for the plaintiff, Sandra Mae Nihill, a minor, by her father and regular

guardian, John Nihill, [313] and against the defendants, Rexall Drug Company, a corporation, doing business as Cara Nome Rexall, and Arnold L. Lewis, doing business as Studio Cosmetics Company, and assess her damages in the sum of $48,000.00.

Dated: April 16, 1958, at Los Angeles, California.

/s/ EARLE H. THOMAS,
Foreman of the Jury."

The Court: Is that the verdict of each and everyone of you?

Mr. Thomas: Yes, sir.

The Court: Any request for a poll?

Mr. Packard: I would like to have the jury polled.

The Court: The Clerk will poll the jury?

The Clerk: Ruth H. Swenson, is this your verdict as presented and read?

Miss Swenson: Yes, it is. [314]

The Clerk: Wyman G. Acton, is this your verdict as presented and read?

Mr. Acton: It is.

The Clerk: Ruth C. Berghoefer, is this your verdict as presented and read?

Miss Berghoefer: Yes, it is.

The Clerk: Frank D. Obenour, is this your verdict as presented and read?

Mr. Obenour: Yes sir.

The Clerk: Elmer M. Greening, is this your verdict as presented and read?

Mr. Greening: Yes, sir.

The Clerk: Gene D. Whitfield, is this your verdict as presented and read? [315]

Mr. Whitfield: Yes, it is.

The Clerk: Earle H. Thomas, is this your verdict as presented and read?

Mr. Thomas: Yes.

The Clerk: Wilson L. Venton, is this your verdict as presented and read?

Mr. Venton: It is.

The Clerk: Joseph L. Hancock, is this your verdict as presented and read?

Mr. Hancock: Yes, it is.

The Clerk: Lorraine Tawam, is this your verdict as presented and read?

Miss Tawam: Yes, it is.

The Clerk: Lillie A. Mitchell, is this your verdict as presented [316] and read?

Miss Mitchell: Yes.

The Clerk: Frances Brayton, is this your verdict as presented and read?

Miss Brayton: Yes.

The Court: Again, I wish to thank the jury for your very patient attendance on this session of the court and the manner in which you listened to the evidence and arguments of counsel and instructions of the court, and the way you worked so diligently since you went to the jury room to arrive at a verdict. It's a rather tragic thing—since the case is over we can say this to you—it is a rather tragic thing to have a jury fail to reach a verdict. Of course the court has no interest in what the verdict should be just so long as it is by twelve jurors, but twelve

jurors have to decide the case sometime because that's the only way that you can decide it. It always grieves me a great deal to have to let a jury have a mistrial because of failure to [317] agree. We will stand in recess.

(Whereupon, at 6:45 o'clock p.m., the hearing was closed.) [318]

[Endorsed]: Filed November 24, 1958.

[Endorsed]: No. 16282. United States Court of Appeals for the Ninth Circuit. Rexall Drug Company, a corporation, and Arnold L. Lewis, doing business as Studio Cosmetics Company, Appellants, vs. Sandra Mae Nihill, a minor, by her father and guardian John Nihill, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: December 10, 1958.

Docketed: December 11, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16282

REXALL DRUG COMPANY, a corporation, doing business as Cara Nome, and ARNOLD L. LEWIS, doing business as Studio Cosmetics Company, Appellants,

vs.

SANDRA MAE NIHILL, a minor, by her father and regular guardian, John Nihill, Appellee.

STATEMENT OF POINTS ON APPEAL AND DESIGNATION OF RECORD PURSUANT TO RULE 17, SUBDIVISION 6

Comes now the appellant Rexall Drug Company, a corporation, and states the points upon which it intends to rely on appeal, as follows:

1. The evidence is insufficient to support the verdict and judgment against the appellant.

2. There was no evidence of any express warranty by the appellant to the appellee or to anyone acting on her behalf.

3. There was no privity of contract between appellant and appellee.

4. The damages awarded to appellee were clearly excessive.

5. The District Court committed prejudicial error in receiving in evidence, over objection, certain advertisements, without proper foundation to show

that the appellee had ever seen or relied upon the advertisements.

6. The court committed prejudicial error in receiving in evidence, over objection, advertisements which were printed after the alleged injury to appellee.

7. The court committed prejudicial error in receiving into evidence, over objection, the testimony of two witnesses with reference to the application of hair solution, with no proper foundation to show that the conditions were the same or similar.

Appellant designates the entire record and all of the material heretofore designated by it in the Designation of Record on Appeal filed with the District Court as being material to the consideration of this appeal and the review of the judgment.

SPRAY, GOULD & BOWERS,
/s/ By PHILIP L. BRADISH,
Attorneys for Appellant
Rexall Drug Company.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 18, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL AND DESIGNATION OF RECORD PURSUANT TO RULE 17, SUBDIVISION 6

Comes now the appellant Arnold L. Lewis, and states the points upon which he intends to rely on appeal, as follows:

1. The judgment is not supported by the evidence.

2. The evidence was insufficient as a matter of law to establish that the appellant, Arnold L. Lewis, was guilty of any actionable negligence which was a proximate cause of any injury or damage sustained by the appellee.

3. The damages awarded are excessive and appear to have been given under the influence of passion or prejudice.

4. The court committed prejudicial error in instructing the jury upon the doctrine of res ipsa loquitur, over objection of the appellant.

5. The court committed prejudicial error in permitting into evidence the testimony of Mrs. Carl Carlson and Mrs. Donald Carlson.

6. The court committed prejudicial error in giving certain instructions over the objection of appellant.

7. The court particularly committed prejudicial

error in instructing the jury upon the doctrine of res ipsa loquitur.

Appellant designates the entire record and all of the material heretofore designated by it in the Designation of Record on Appeal filed with the District Court as being material to the consideration of this appeal and the review of the judgment.

REED, CALLAWAY, KIRTLAND & PACKARD AND HENRY E. KAPPLER,

/s/ By HENRY E. KAPPLER,

Attorneys for Appellant Arnold L. Lewis.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 18, 1958. Paul P. O'Brien, Clerk.